

No. 16168 ✓

United States
Court of Appeals
for the Ninth Circuit

VAN BRODE MILLING CO., INC.,
Appellant,
vs.

COX AIR GAUGE SYSTEM, INCORPORATED,
Appellee.

Transcript of Record
(In Two Volumes)
VOLUME I.
(Pages 1 to 440, inclusive,)

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

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PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer	8
Appeal:	
Certificate of Clerk to Transcript of Record on	60
Notice of	58
Statement of Points on (USCA).....	434
Stipulation Extending Time to File Record and Docket	59
Certificate of Clerk to Transcript of Record...	60
Complaint	3
Findings of Fact, Conclusions of Law and Judgment	41
Judgment	57
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	58
Opinion	15
Reply	14

ii.

Statement of Points on Which Appellant Intends to Rely (USCA).....	434
Stipulation Extending Time to File Record and Docket Appeal.....	59
Transcript of Proceedings and Testimony (Partial)	62
Exhibits For Defendant:	
I—Letter Dated July 24, 1957, J. S. Whitaker, Bakelite Co. to Albert N. Proujansky	511-512
J—Technical Bulletin, Dewey and Almy, May 1949, Subject: "Darex Copolymer No. 3"	513-516
K—Article "Synthetic Rubber and Rubber Derivatives" by Donald S. Black...	517-519
U—Copy of Letter Dated July 22, 1957 Addressed to Bakelite Company, Att. Mr. J. S. Whitaker.....	521
Exhibits For Plaintiff:	
1—Patent in Suit, S. Coleman No. 2,710,-660	441
2—File Wrapper of Patent No. 2710660 (Partial)	445-459
30—Schedule of Sales of Battery Hold-Downs	460
63—Stipulation of Facts Dated March 20, 1958	461-464

Transcript of Proceedings—(Continued):

Exhibits For Plaintiff—(Continued):

- 69—The Vanderbilt Rubber Handbook,
Oct. 28, 1948 (Partial)..... 465
- 70—Specifications For Government Syn-
thetic Rubbers Effective January 1,
1947 (Partial)466-467
- 71—Specifications For Government Syn-
thetic Rubbers, Revised Edition, Octo-
ber 1, 1952 (Partial).....468-474
- 72—A Summary of Data on Synthetic
Rubber, July 1944..... 475
- 78—Stipulation Dated March 20, 1958..477-479
- 82—Modern Plastics Encyclopedia, 1949
(Partial)480-484
- 83—1950 Modern Plastics Encyclopedia
and Engineer's Handbook
(Partial)485-487
- 84—1951 Modern Plastics Encyclopedia
and Engineer's Handbook
(Partial)488-490
- 85—1952 Modern Plastics Encyclopedia
and Engineer's Handbook
(Partial)491-493
- 86—Correspondence and Invoices Between
Dewey and Almy Company and Van
Brode Milling Company.....495-512

Transcript of Proceedings—(Continued):

Witnesses:

Bean, Morton (Deposition)	
—direct	98
Colarusso, Augustine L. (Deposition)	
—direct	341
Coleman, Sidney (Deposition)	
—direct	364
Ert, Samuel	
—direct	63
—cross	81
—redirect	91, 96
—recross	94
Fritsch, Erich (Deposition)	
—direct	250
—cross	265
—redirect	274
—direct	399
Fritzhand, Rudolph (Deposition)	
—direct	160
Goldin, Abraham (Deposition)	
—direct	114
—cross	119
—redirect	122
—recross	125
Kraver, Samuel J. (Deposition)	
—direct	127

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

Maitland, Peter M. (Deposition)

—direct 331

Miller, Isador

—direct182, 197

—cross 218

—redirect 246

—recross 249

—rebuttal, direct 418

Phillips, Daniel P. (Deposition)

—direct 358

Stringfield, Raymond B.

—direct278, 295

—cross 303

—redirect 329

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* Page numbers appearing at bottom of page of Original Transcript of Record.

United States District Court, Southern
District of California, Central Division

Civil Action No. 1045-57 TC

VAN BRODE MILLING CO., INC.,

Plaintiff,

vs.

COX AIR GAUGE SYSTEM, INCORPORATED,

Defendant.

COMPLAINT

For Infringement of United States Letters Patent
No. 2,710,660 and For Unfair Competition

Plaintiff complains of the defendant and alleges:

For A First Count

1. Plaintiff is a corporation of the State of Massachusetts, having its principal place of business at Clinton, Massachusetts.

2. Upon information and belief defendant is a corporation of the State of California, having its principal place of business at 2207 South Main Street, Los Angeles 7, California.

3. This cause of action arises under the patent laws of the United States.

4. On June 14, 1955, United States Letters Patent No. 2,710,660 was duly and legally issued to plaintiff as assignee of Sidney Coleman of Maynard, Massachusetts, for an invention in "Battery

Hold-Down Frame of Synthetic Rubber Resin Material". [2]

5. Plaintiff is the owner by assignment of all right and title to United States Letters Patent No. 2,710,660 aforesaid.

6. For some time past defendant has been and still is infringing said Letters Patent No. 2,710,660 by selling in the Southern District of California and elsewhere in the United States battery hold-down frames embodying the patented invention, and will continue said infringement unless enjoined by this Court.

7. Plaintiff has placed the required statutory notice on all battery hold-down frames manufactured and sold by it under said Letters Patent.

8. Plaintiff has been damaged and defendant has profited by said infringement, and plaintiff will be irreparably injured unless this infringement is enjoined.

For A Second Count

9. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" and "2" of this complaint with the same force and effect as if herein set forth at length.

10. This cause of action is for unfair competition and constitutes a substantial and related claim of unfair competition to the claim of patent infringement set forth in the First Count herein, and the Court has jurisdiction of this cause of action under § 1338 of Title 28 of the United States Code.

11. The matter in controversy exceeds, exclusive

of interest and costs, the sum of Three Thousand Dollars (\$3,000.00). Accordingly, the Court has jurisdiction of this cause of action additionally under § 1332 of Title 28 of the United States Code.

12. Plaintiff has for a number of years been and still is engaged in the business of manufacturing and selling battery hold-down frames, and said product of plaintiff has been continuously sold throughout the United States of America, and plaintiff has built up a large and valuable good will and [3] business in said product as being of superior workmanship and design.

13. Plaintiff has extensively sold battery hold-down frames embodying the invention of Patent No. 2,710,660 aforesaid continuously for a number of years in the Southern District of California and elsewhere in the United States, said frames being sold in packages having a distinctive get-up and color scheme and said frames themselves having a distinctive red color in consonance with the dominant color of plaintiff's said packages, all of which have come to be associated by the trade and the purchasing public with the product of plaintiff and plaintiff only.

14. In connection with the sale of the battery hold-down frames aforesaid, plaintiff has employed advertising materials having distinctive legendary matter which has come to be associated by the trade and purchasing public with the product of plaintiff and plaintiff only.

15. The battery hold-down frames sold by defendant are identical in appearance to plaintiff's

hold-down frames and the packages and advertising materials employed by defendant in the sale of said battery hold-down frames are substantially the same in get-up, appearance, color scheme and legendary matter as plaintiff's aforesaid packages and advertising, and the battery hold-down frames sold by defendant are of the identical color as plaintiff's, so that said battery hold-down frames sold by defendant and said selling and advertising materials are calculated to confuse, and, upon information and belief, have caused confusion in the trade and of the general public, and, upon information and belief, said battery hold-down frames sold by defendant have been and are being passed off by defendant and its customers as and for plaintiff's well-known [4] product, all to the unlawful profit of defendant and to plaintiff's irreparable damage and injury.

16. Upon information and belief defendant has made substantial profits from said unfair competition with plaintiff and has caused substantial damage to plaintiff.

17. Plaintiff has no adequate remedy at law and cannot obtain any adequate relief save in this Court by injunction accounting and damages.

Wherefore, plaintiff demands judgment that:

(1) The defendant, its agents, servants and employees and those acting in privity or concert with it, be pendente lite and forever enjoined and restrained from further infringement of United States Letters Patent No. 2,710,660 and against further competition.

(2) All substantially identical and/or confusingly similar packages and advertising materials in the possession or control of defendant used in connection with the sale or offering for sale of battery hold-down frames be impounded or destroyed or so radically altered as not to embody the distinctive appearance of plaintiff's packages and advertising materials for its battery hold-down frames.

(3) The plaintiff recover from the defendant general damages because of defendant's infringement of said United States Letters Patent No. 2,710,660 and unfair competition with plaintiff. [5]

(4) The defendant be ordered to account for and pay over to the plaintiff all profits realized by it upon sales of the said battery hold-down frames in infringement of plaintiff's aforesaid patent and from said unfair competition.

(5) Costs, disbursements and attorneys' fees be assessed against defendant.

(6) The plaintiff have such other and further relief as the Court may deem just and proper in the premises.

VAN BRODE MILLING CO., INC.,
By LYON & LYON,
/s/ REGINALD E. CAUGHEY,
Attorneys for Plaintiff.

KIRSCHSTEIN, KIRSCHSTEIN &
OTTINGER,
Of Counsel for Plaintiff. [6]

[Endorsed]: Filed September 3, 1957.

[Title of District Court and Cause.]

ANSWER

The defendant answers the complaint as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant admits the allegations stated in paragraphs 1, 2, 3, 5, and 9 of the complaint; denies knowledge or information sufficient to form a belief as to paragraphs 7 and 12 of the complaint; denies the allegations of paragraphs 6, 8, 10, 11, 13, 14, 15, 16, and 17; and denies the allegations in paragraph 4 of the complaint in so far as they assert that United States Letters Patent No. 2,710,660 were duly and legally issued to plaintiff.

Third Defense

Defendant, further answering, avers that said United States Letters Patent No. 2,710,660 and the claims in suit thereof are invalid and void and of no effect in law for the following reasons, [9] among others:

(1) That the patentee thereof was not the original and first inventor or discoverer of the alleged invention therein set forth and claimed, or of any material or substantial part thereof, but on the contrary, long prior to the alleged invention or discovery by said patentee, said invention was known,

discovered and invented by others; and/or the alleged invention and all material or substantial parts thereof were in public use and/or on sale in the United States for more than one year prior to patentee's application for letters patent; and/or all material or substantial parts thereof were published and/or patented by others in the United States and/or foreign countries for more than one year prior to his application for letters patent, by the persons, and at the places, as shown in and by the patents and publications as follows:

Patentee	Patent No.	Date of Issue
Mabey	1,677,789	July 17, 1928
Heitshu	2,360,056	Oct. 10, 1944
Leuvelink	2,382,426	Aug. 14, 1945

Publication

Technical Bulletin C-4

Date: May, 1949

Dewey and Almy Chemical Company

Cambridge 40, Mass.

Subject: Darex Copolymer No. 3

and by other persons, prior inventors, public users, patents and by other persons and publications *now known* to defendant, which defendant begs leave to insert by amendment when discovered.

(2) The alleged invention does not constitute a patentable invention, improvement or discovery within the meaning of the patent law in view of the prior state of the art as disclosed in the various patents and publications and in view of what

was common knowledge of those skilled in the art at the time of the alleged invention by said patentee. [10]

(3) In view of the prior art and the wording of the claims of said Letters Patent and of the proceedings in the Patent Office in connection therewith, said Letters Patent is of such limited scope that it does not cover any of the battery hold-down frames as made and sold by the defendant.

(4) The composition and production of the plaintiff's patent was a common and well-known composition and production at the time of the alleged invention purported to be patented in the aforesaid patent. If, therefore, any claim of said Letters Patent would be construed to cover any of the defendant's compositions and productions, such claim is invalid for want of novelty over previous patents, publications and prior uses.

(5) The said Letters Patent in suit is invalid because it is ambiguous, incomplete and uncertain and because the disclosures and claims therein of the alleged invention are not in such full, clear, concise and exact terms as to enable persons skilled in the art to practice the alleged invention as required by law.

(6) While the application for said Letters Patent was pending, the applicant so limited and confined the claims of his application that the plaintiff cannot seek for nor obtain constructions for such claims sufficiently broad to cover any composition or production made and sold by the defendant.

(7) The said Letters Patent in suit is invalid because for the purpose of deceiving the public, the description of the alleged invention filed in the Patent Office was made to contain less than the whole truth relative to the alleged invention, or more than was necessary to produce the desired effect; and because such description was designed to mislead the public as to the character of the alleged invention; and because of the misstatements presented or made by the patentee to the Patent Office for the purpose of inducing the Patent Office to withdraw its rejection of the claims of the application for said patent. [11]

(8) The said Letters Patent in suit was issued without adequate appreciation and understanding of the state of the art by the United States Patent Office and important parts of relevant prior art were overlooked; wherefore, the Commissioner of Patents exceeded his legal authority in granting said Letters Patent, and the same is, therefore, void for lack of originality.

(9) Said Letters Patent in suit is void and invalid because the invention claimed in said patent is substantially different from any invention indicated, suggested or described in the original application.

(10) Each of the claims of said Letters Patent in suit is invalid and void because the disclosure upon which the claim or claims are based is inoperative.

(11) The said Letters Patent is void and invalid

because the invention or discovery alleged to have been the sole invention was, in fact, a joint invention.

(12) The said Letters Patent in suit is void and invalid because the plaintiff and the patentee unjustly obtained the patent and had claims allowed for that which they knew was the invention of another (if there was any patentable invention in the thing purported to be patented by said Letters Patent) or was known in the prior art.

(13) The alleged invention and improvement purported to be covered by said Letters Patent in suit was not proper patentable subject matter and was not new and useful at the time of the alleged invention thereof by the patentee, and is wholly devoid of value and utility and is not the subject matter of valid letters patent.

(14) Because said Letters Patent sets forth and describes an old and familiar device which was known to others and which was in extensive public use long prior to the alleged invention or discovery thereof by the patentee and for more than one year prior to the filing of its application thereon, and within reach and at the disposal of any person familiar with the art to which said alleged [12] invention or discovery belongs, and analogous arts, at the time of and many years before the alleged invention or discovery by the patentee, and said device as claimed in said Letters Patent involved nothing more than mere mechanical skill and did not involve invention.

(15) Because plaintiff is estopped to assert and is not entitled to assert that the subject matter of the claims of said Letters Patent of the United States No. 2,710,660 may validly be claimed or lawfully enforced.

Counterclaim For Declaratory Judgment As To
The Validity and Infringement of United
States Letters Patent No. 2,710,660

(1) This cause of action arises out of an actual controversy between the parties hereto, namely, plaintiff's assertion of Letters Patent No. 2,710,660 against defendant and the charge that Battery Hold-Down frames being sold, made and used by defendant infringe said patent.

(2) Jurisdiction is conferred upon this Court with respect to this cause of action by the Patent Laws of the United States and by Title 28, United States Code, Sections 1338, 2201 and 2202.

(3) The United States Letters Patent No. 2,710,660 are invalid and void for the reasons specifically set forth in the Third Defense hereinabove, the allegations of which are set forth herein by reference.

(4) Defendant further avers that it has not committed acts of infringement of rights of plaintiff or of United States Patent No. 2,710,660.

Wherefore, defendant prays:

(a) That the complaint be dismissed.

(b) That this Court grant a declaratory judgment that said Letters Patent No. 2,710,660 is in-

valid, void and of no effect and not infringed by defendant. [13]

(c) That this court grant to defendant its costs, legal expenses and attorneys' fees in this action.

(d) That this court grant defendant such other relief as may be proper.

/s/ I. STEPHEN BRENT,
Attorney for Defendant. [14]

Affidavit of Service by Mail Attached. [15]

[Endorsed]: Filed October 18, 1957.

[Title of District Court and Cause.]

REPLY

Plaintiff answering defendant's counterclaim for Declaratory Judgment alleges as follows:

1. Plaintiff denies the allegations of paragraphs "3" and "4" of the counterclaim.

Wherefore plaintiff demands judgment that the defendant's counterclaim herein be dismissed.

VAN BRODE MILLING CO., INC.,
By LYON & LYON,
/s/ REGINALD E. CAUGHEY,
Attorneys for Plaintiff.

KIRSCHSTEIN, KIRSCHSTEIN &
OTTINGER,
Of Counsel for Plaintiff. [16]

Affidavit of Service Attached. [17]

[Endorsed]: Filed October 28, 1957.

[Title of District Court and Cause.]

OPINION

Yankwich, Chief Judge:

Involved in this litigation are validity and infringement¹ of Coleman Patent No. 2,710,660 filed December 10, 1951 and issued June 14, 1955, for "a battery hold-down frame of synthetic rubber resin material". The chief objects of the invention are stated in the specifications in this manner:

"The main object of the present invention is to provide a hold-down frame made of a material strong enough to resist deformation under tension of the bolts by means of which the hold-down frame is clamped against the battery top, and possessing sufficient resiliency effectively to prevent cracking of the battery top.

"Another object of the invention is the provision of a battery hold-down device which is made of a material that has good electrical insulating properties and is, thus, especially suited for use in connection with electrical batteries.

"A further aim of the invention is to obtain a hold-down device of the character mentioned which has a relatively high heat resistance, and which is non-corrodible, being thus able to withstand deformation by the heat of the engine, near which it is, of necessity, located, and not being subject to attack by the electrolyte of the battery.

"Still another object of the invention is to pro-

¹ 28 U.S.C.A., § 1338.

vide [117] a battery hold-down device of a material which will not adhere to the battery, thereby permitting convenient removal thereof from the battery."

The Claims are four in number. They are printed in the margin.²

Plaintiff's complaint put in issue the infringement of Claim 3, and also charged unfair competition. However, the defendants, by answer and counterclaim, have challenged the validity of all

² What I claim is:

1. A one-piece open battery hold-down frame formed of plastic material, comprising sides, ends connecting said sides, and diagonal clamping members being disposed above the top faces of said ends and sides, the plastic material of which said frame is formed comprising polystyrene the mechanical and physical properties of which have been modified by the addition of a Buna S with a high styrene content, the latter imparting to the polystyrene improved heat resistance, building strength and toughness sufficient to withstand pressure to which the frame is subjected in its function to hold the battery on its support, and also imparting to the polystyrene enough flexibility to prevent breakage of the battery top against which said diagonal members bear in the holding down operation.

2. A one-piece battery hold-down frame according to claim 1, including an inorganic filler added to the modified polystyrene to increase the elasticity of the compound.

3. A one-piece open battery hold-down frame formed of plastic material and including elements bearing against the sides and top of the battery, the plastic material of which said frame is formed comprising polystyrene the mechanical and physical properties of which have been [137] modified by the addition of a Buna S with a high styrene con-

the Claims and, in addition to non-infringement, have pleaded anticipation, invention by others and lack of patentability.³

I.

The Unfair Competition Claim

Plaintiff's pendant claim of unfair competition⁴ may be disposed of summarily by stating that the only alleged act of unfair competition is similarity of the frames of the defendant and of the boxes in which they are kept. The frames are of the same size, because they must fit standard batteries. They are both red. But the plaintiff has no exclusive right to the size of a hold-down which must fit standard batteries. Nor can he appropriate the color red for the making of a plastic hold-down frame and,—in the absence of any imitative deceptive devices which tend to mislead the public as to source and sponsorship of the goods,—claim unfair competition on the part of another device similarly made of plastic and colored red.⁵

tent, the latter imparting to the polystyrene improved heat resistance, building strength and toughness sufficient to withstand pressure to which the frame is subjected in its function to hold the battery on its support, and also imparting to the polystyrene enough flexibility to prevent breakage of the battery top against which elements of said frame bear in the holding down operation.

4. A one-piece battery hold-down frame according to claim 3, including an inorganic filler added to the modified polystyrene to increase the elasticity of the compound."

³ 35 U.S.C.A., § 102(a)(b)(e) and (f).

⁴ 28 U.S.C.A., § 1338(b).

⁵ See the writer's opinion in *Chun King Sales v.*

No evidence has been offered as to actual confusion or tendency to confuse. The evidence in the record shows that the [118] frames are not stacked on shelves where a customer might see them. They are boxed in cartons of the same size, depending upon the size of the batteries. As batteries are standard, the size of the devices, by whomever manufactured and the boxes in which they are kept, must of necessity, be similar. The boxes of the plaintiff emphasize a solid red background with letters and symbols in white. Those of the defendant combine yellow and red, with yellow as the background. The legends are different. So are the symbols. And, even if a customer were to pick one from the shelf, as in the case of canned goods, there would be no likelihood of confusion. As it is, they are not sold by trade name. They are sold, as testified to without contradiction, at the trial, by gas station attendants when asked by an automobile owner to replace the hold-down frame made of steel which all standard automobiles carry. In most instances, the evidence is that it is the supplier who suggests the plastic article in lieu of the equipment to be replaced and is priced higher than the steel replacements. Automotive retailers supply them to the gas stations.

There is nothing in the record to indicate that, in the trade, the color red on the frame, or the colors red and white on the boxes have become asso-

Oriental Foods, D.C. Cal., 1955, 136 Fed. Supp. 659, 662-666; *Oriental Foods v. Chun King Sales*, 9 Cir., 1957, 244 F. 2d 909, 915-916.

ciated, in the minds of either prospective customers or suppliers with the plaintiff's product, or that either have acquired a secondary meaning which identifies their source and sponsorship with the plaintiff. So the case is lacking absolutely in the essentials which go to constitute unfair competition. [119]

II.

The Patent In Suit

The application originally sought two claims, reading:

"1. A one-piece open battery hold-down frame formed of plastic material, comprising sides, ends connecting said sides, and diagonal clamping members at the juncture of said sides and ends, said clamping members being disposed above the top faces of said ends and sides, the plastic material of which said frame is formed possessing strength and toughness sufficient to withstand pressure to which the frame is subjected in its function to hold the battery on its support but having enough flexibility to prevent breakage of the battery top against which said diagonal clamping members bear in the holding down operation.

"2. A one-piece battery hold-down frame according to claim 1, including lugs for engagement with means which force said clamping members into engagement with the battery top."

They were rejected finally by the Examiner on July 2, 1953. On appeal taken by the patentee to the Board of Appeals the action of the Examiner was

approved on March 16, 1955. On April 2, 1955, the applicant filed a proposed amendment to the specifications and new claims by which he claimed the original two claims and the four claims which are now in the patent. The Examiner disallowed the original two claims but allowed the claims now in [120] suit. These facts are very significant, because they indicate clearly that what the patentee originally sought was a monopoly for the construction of a hold-down frame of plastic.

The Examiner, in his first rejection, stated that such a claim was anticipated:

“The further fact that applicant uses a different material than either of these patentees does not produce an article meriting patentability. Moreover the use of plastic, the material adopted by applicant, in forming a holding device, is shown to be old in Leuvelink—see page 2, column 2, lines 49-54 and page 3, column 2, lines 6-8.”

His final rejection included this ground. So what came out of the Patent Office was a patent for an article, in itself not patentable, made of a particular plastic material.

What the patentee now seeks is to monopolize the field by claiming that he taught the art the combination by interpolymerization of the two chemical elements, butadiene and styrene, to secure a plastic frame of this durability.⁶

⁶ See the writer's opinion in *Joyce, Inc. v. Solnit*, D.C. Cal., 1939, 29 Fed. Supp. 787; and see, *Ander-*

The inventor, Coleman, is not a chemist. The patent in suit, while claiming the combination of butadiene and styrene to produce a Buna S with a "high styrene content" does not specify the proportions to be used. Nor do the specifications. The copolymer referred to as "Darex copolymer No. 3" is manufactured by Dewey & Almy Chemical Company and its formula is known. "Buna S" is a synthetic rubber-resin made by polymerization of butadiene and styrene, invented by the Germans during World War I. The [121] use of the name has disappeared, because later chemistry has displaced the catalyst used in such synthetic materials. The term in the trade for the ordinary synthetic rubber-resin now used is GR-S (Government Rubber Styrene).

There is nothing in the patent to indicate to anyone skilled in the art what the words "high styrene content" mean.

It is a well-known rule that an inventor will be given the benefit of his invention, even though he may, himself, not understand

"the exact nature of the physical or chemical changes involved or resulting from his process, if the product and the process are novel and useful." ⁷

son v. Phoenix Products Co., 7 Cir., 1955, 226 F. 2d 191, 193. A patentee cannot claim more than he invented. *Lincoln Engineering Co. v. Stewart-Warner Corp.*, 1938, 303 U.S. 545, 549.

⁷ *Celite Corporation v. Dicalite Co.*, 9 Cir., 1938, 96 F. 2d 242, 246; *Application of La Verne*, C.C.P.A., 1956, 229 F. 2d 470, 473-474. [138]

But an inventor like Coleman who claims a monopoly for a process polymerization of two elements, butadiene and styrene, well-known in the field of chemistry, and who states under oath, as will appear more fully in the discussion to follow,—that he had in mind a styrene proportion “higher than fifty per cent” is confronted with one of several consequences. Either there is no patentability because the patent does not teach any more than what chemical knowledge teaches, i.e., the result of interpolymerizing the two elements, or his patent is invalid for insufficient disclosure.⁸ Or, if his definition is accepted, there is no infringement, if another person combines the same elements in different quantities and produces a less durable product.

III.

Patentability

The evidence in the record indicates that the plaintiff's [122] patented article has had commercial success. However, such success does not spell patentability if there be no invention.⁹ And the latest decisions of the Supreme Court dealing with chemical patents teach that applying an old process

⁸ 35 U.S.C.A., §§ 111, 112, *Becket v. Coe*, U.S. App. D.C., 1938, 98 F. 2d 332, 336-337; *General Electric Co. v. Wabash Appliance Corp.*, 1938, 304 U.S. 364. The Supreme Court has stated:

“Certainly, if we are to be consistent with Rev. Stat. 4888, a patentee cannot obtain greater coverage by failing to describe his invention than by describing it as the statute commands.” (*Halliburton Co. v. Walker*, 1946, 329 U.S. 1, 13.)

⁹ *Celite Corporation v. Dicalite Co.*, *supra*, Note 7,

to an analogous use lacks the very essence of invention.¹⁰ As stated in a leading case:

“A product claim describes an article, new and useful. The principle of the Ansonia case plainly would deny validity to the Pipkin patent if the prior art disclosed an electric bulb so frosted on the inside as to round out the angular crevices produced by the first etching, whether the full utility of the bulb had been previously recognized or not. The same result is indicated where, as in the present case, the prior art discloses the method of making an article having the characteristics of the patented product, though all the advantageous properties of the product had not been fully appreciated.”¹¹ (Emphasis added.)

This is but an application to chemical patents of the principle that, in order for a new use to be patentable, there must be a new, different and non-analogous result not taught by the prior art and not discernible to those skilled in the art.¹² Unless the patent, especially a process patent, achieves such result, it does not constitute invention, even though it may constitute an improvement on the prior product. [123]

p. 242; *Photochart v. Photo Patrol*, 9 Cir., 1951, 189 F. 2d 625, 628; *Dow Chemical Co. v. Halliburton Oil Well Cementing Co.*, 1945, 324 U.S. 320, 330.

¹⁰ *Dow Chemical Co. v. Halliburton Oil Well Cementing Co.*, *supra*, Note 9, pp. 327-330; *Mandel Brothers, Inc. v. Wallace*, 1948, 335 U.S. 291, 296.

¹¹ *General Electric Company v. Jewel Incandescent Lamp Co.*, 1945, 326 U.S. 242, 248.

¹² *Potts v. Creager*, 1895, 155 U.S. 597, 607-608; *Gilbert Spruance Co. v. Ellis-Foster Co.*, 3 Cir.,

The principle was stated by the Court of Appeals of the District of Columbia in a noted case:

“There was no new idea involved in the claimed invention in this case; nor even in a new use made of an old idea. It was no more than a carrying forward of the original idea of using an adhesive tape as a mask for spray-painting, which was well known in the industry. While the Drew composition constituted a more effective combination of familiar ingredients than those previously used, the result was not new within the meaning of patent law, and did not rise to the dignity of invention. The use of his composition accomplished the same thing in the same way, by substantially the same means, with better results. This did not constitute such an invention as to sustain a patent.

“The general characteristics of rubber for adhesiveness and cohesiveness when combined with resin, fillers—such as zinc oxide,—and solvents, as specified in appellant’s claims, were known. Years of experimentation had been devoted to the subject of rubber adhesives, [124] resulting in the production of many varieties of tapes, cements and other products well known to laymen as well as to those

1940, 114 F. 2d 771, 773; *In re Thuau*, C.C.P.A., 1943, 135 F. 2d 344; *In re Prutton*, C.C.P.A., 1946, 156 F. 2d 87, 88-89; *In re Prutton*, C.C.P.A., 1946, 156 F. 2d 91; *Application of Waite*, C.C.P.A., 1948, 168 F. 2d 104, 108; and see, the writer’s opinion in *Elrick Rim Co. v. Reading Tire & Rubber Co.*, D.C. Cal., 1957, 157 F. Supp. 60, 63; *Stallman v. Casey Bearing Co.*, 9 Cir., 1957, 244 F. 2d 905, 907-908; *Application of Freed*, C.C.P.A., 1946, 156 F. 2d 92, 98. [139]

trained in the art. The final product, upon which a patent is claimed here, came as a result of this long and gradual process of experimentation and differs from those of the prior art only in degree and only as to relative adhesiveness and cohesiveness. No new element was introduced, no startling, unexpected, or radical result was produced. The change made as a result of Drew's research was a change only in form, proportion and degree, plainly indicated by the prior art. It was an easy step rather than a difficult one."¹³ (Emphasis added.)

In dealing with metallic alloys or chemical combinations, proportion may, at times, be a critical part of an invention, because it may produce a new and more durable product unlike others known before. So the Courts have recognized, at times, invention to consist of combining certain elements in certain definite proportions, but only when an entirely new and non-analogous result is obtained.

In a leading case on the subject, which has been followed ever since, it was stated:

"Patentable novelty may reside either in the elements of alloys or in the proportions of the [125] elements. If novelty of elements is claimed in the first patent, that patent falls on the plaintiff's failure to controvert the defendant's evidence abund-

¹³ *Minnesota Mining & Mfg. Co. v. Coe*, U.S. App. D.C., 1938, 99 F. 2d 986, 990; and see, *Old Town Ribbon & Carbon Co. v. Columbia Ribbon & Carbon Co.*, 2 Cir., 1947, 159 F. 2d 379; *Sherwin-Williams Co. v. Marzall*, U.S. App. D.C., 1951, 190 F. 2d 606, 607; *Application of Aller*, C.C.P.A., 1956, 220 F. 2d 454, 456.

antly showing that before Churchward vanadium was used with chromium, nickel, manganese and carbon in alloy steels. If novelty of elements is claimed in the second patent, that patent falls on the showing of the first patent. Novelty of the patented alloys, if any, must therefore be found in the proportions of the elements. * * * But novelty of proportions in the sense of the patent law involves something more than figuring out proportions differing from any that were known before. It involves new results from new proportions, developing a new metal, or, it may be, an old metal with new characteristics of structure or performance, embracing entirely new, or at least substantially enhanced, qualities of utility.”¹⁴

The new codification of the patent law embodies these principles when it defines patentability as:

“* * * any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof,”¹⁵

In applying the principle, the Courts have held

¹⁴ Bethlehem Steel Co. v. Churchward Steel Co., 3 Cir., 1920, 268 Fed. 361, 364; and see, Darwin & Milner v. Kinite Corp., 7 Cir., 1934, 72 F. 2d 437, 438; Sakatwalla v. Marburg, C.C.P.A., 1949, 172 F. 2d 227, 232; Oxnard Cannery v. Bradley, 9 Cir., 1952, 194 F. 2d 655, 659. If an element or proportions are critical, they should be disclosed in the patent. Helene Curtis Industries v. Sales Affiliates, 1956, 2 Cir., 233 F. 2d 148, 159-160; Stallman v. Casey Bearing Co., 1957, 9 Cir., 244 F. 2d 905, 907-908.

¹⁵ 35 U.S.C.A., § 101.

that mere changes of size or substitution of obvious material do not amount to patentability.¹⁶ And our own Court of Appeals has warned us: [126]

“But perfection of workmanship, however useful or convenient, does not constitute invention.”¹⁷

IV.

The Facts Proved At The Trial

Allusion has already been made to the fact that the original claims of the patent in suit were rejected because the Examiner was of the view that the use of plastic for the making of a hold-down frame for a battery did not involve invention, and that invention was not involved in selecting a particular plastic. The Examiner concluded his final rejection in these words:

“To so select one plastic rather than another, in order to secure one which is judged to be best for the particular service is an everyday practice in the field of plastics, and the mere expression in the present claims of the particular properties expected from the plastic to be used is not considered a basis for patentability.”

The reference in the first rejection to Leuvelink patent is very important. The date of that application was April 22, 1944. The device was a clamping device for electrical units such as batteries and the like. In the specifications, dielectric,—i.e., non-

¹⁶ Application of Daniel S. Wolfe, C.C.P.A., 1957, 251 F. 2d 854, 856.

¹⁷ Photochart v. Photo Patrol, 9 Cir., 1951, 189 F. 2d 625, 628.

conductive—insulating material, was recommended in order that the base or the mounted plate be insulated from the unit and the element. In recommending the material to be used, Leuvelink stated in his specifications:

“The compression element 12 is preferably formed of insulating material, such as fiber or plastic, [127] to eliminate grounding of the tube to the base plate or in some instances where slight yieldability is desirable and heating effect is of negligible consequence, the element may be formed of molded rubber or similar composition. In the specific illustration of Figs. 1 and 2, the element 12 is preferably formed of two punched discs or plates 16 and 17 of a fiber-glass phenolic composition, to withstand temperatures as high as 300° F., so that deterioration is avoided when in contact with a tube which dissipates considerable heat energy.” (Emphasis added.)

Claim 8 of that patent reads:

“8. A clamping device for a detachable electron discharge tube mounted in a socket, which comprises a pair of rigid posts extending on opposite sides of said tube, a ring member of insulating material having high dielectric properties bearing against the top of said tube, said member having opposed apertured portions slidably fitting over said posts, and a resilient ring secured to said ring member at diametrically opposed points thereon, the free portions of said ring being flexed away from said insulating ring member and having wedg-

ing action against the inner surfaces of said posts to lock said insulating ring member against the top of said tube." (Emphasis added.) [128]

In the original application for the patent in suit, the composition of the materials in the plaintiff's frame was not described with any definiteness. After the Board of Appeals affirmed the Examiner on the ground that the claims were "obviously broader than the disclosure" and made a new rejection on that ground under their Rule 96(b), the patentee amended his application. In one amendment he described the type of copolymer to be used, to include the following:

" 'Darex copolymer No. 3' above referred to is an elastic type of synthetic rubber resin, made by copolymerizing butadiene and styrene to produce a Buna S with a high styrene content."

This definition made its way into the specifications of the patent as granted. However, neither they nor the claims of the patent as issued disclose what is meant by "high styrene content." There is a document in the file wrapper attached to the proposed amendment dated April 7, 1955, which was also introduced at the trial, — a circular by the manufacturer of the composition, which states that the styrene content of the Darex copolymer No. 3 is 70 per cent. Nowhere else are we told what "a high styrene" content means. The inventor in his deposition already referred to stated:

"Q. Mr. Coleman, do you know what the term

high-styrene content means in reference to a butadiene-styrene copolymer?

"A. I believe I do. It means that there is lots of styrene in the majority of the material—the [129] majority of the material contains styrene.

"Q. When you say majority, would you mean more than 50%?

"A. This would be what I think is so.

"Q. In other words——

"A. I have nothing to substantiate. This is just my pure thinking on the thing.

"Q. In other words your pure thinking on the thing, is that right? "A. Yes.

"Q. Indicated that a high-styrene content——

"A. Means more than 50%.

"Q. More than 50% styrene?

"A. Right." (pp. 54, 55.) (Emphasis added.)

The evidence in the record shows that for the first year after the application for the patent was made, during which some 16,000 frames were sold, the chemical combination did not work successfully: defects appeared in the coloration of the frames and there were some breakages. Ultimately, the compound originally used was abandoned in favor of two different compounds available commercially and manufactured by Dow Chemical Company and Monsanto Chemical Company, both of which have a copolymer with a styrene content as high as 80 per cent. Compounds of such high high styrene content were known to the art. There is in evidence a patent to Ditz, No. 2,578,518, issued December 11, 1951, the

filing date of which is May 26, 1948, which is titled "A Moulding Composition for Battery Containers" which not only [130] recommends the use of plastics for battery containers, but actually gives the proportions of two compositions which, when tested, showed the greatest durability. They are copied in the margin.¹⁸

Beginning in 1948, the known literature in the realm of the chemistry of rubber resins taught the use of high styrene to effect greater resistance. In

¹⁸ "Example V. The following composition in which the parts are by weight was prepared as described in Example I:

Polystyrene	90
Copolymer of butadien-1, 3 with styrene (50:50)	10

When molded into a battery container and tested as set forth in Examples I and II above, it exhibited the following properties: [140]

Izod impact—0.47 ft. lb. per inch of notch.

Bulge test—change too small for measurement.

Acid absorption (28 days at 150° F.)—0.072%.

Resistance to the hot and cold cycle test was approximately the same as that of Example I.

Example VI. The following composition in which the parts are by weight was prepared as described in Example I:

Polystyrene	75
Copolymer of butadiene-1, 3 with styrene (50:50)	25

When subjected to the tests described in Examples I and II above, the following results were obtained:

Izod impact—0.50 ft. lb. per inch of notch.

Bulge test—change too small for measurement.

Acid absorption (28 days at 150° F.)—0.066%.

Results for the hot and cold cycle test were approximately the same as for Example I."

the October, 1948 issue of *India Rubber World*, there appeared an article by H. S. Sell and R. J. McCutcheon of the Goodyear Tire & Rubber Co. in which, in summing up the advancement in the use of synthetic resin rubber blends, it was stated:

"During the course of the past two years the use of high styrene copolymer resins as reinforcing and hardening agents for stocks of GR-S, natural rubber, nitrile rubber, and neoprene has gained widespread acceptance within the rubber industry. In this classification of high styrene copolymer resins are found resins which have styrene-diolefin ratios ranging from 70% styrene to under 95% styrene. The general properties and uses of these resins in rubber compounds have been discussed in the literature."¹⁹ (Emphasis added.)

In *Modern Plastics* of December, 1948, in an article entitled "Interpretations of the Current News," an improved plastic compound known as "Styrene 637" produced by Dow Chemical Company, it is shown that by using polymer of high styrene content, plastic materials can be molded to fit a great variety of objects. [131] It is given in the margin.²⁰

¹⁹ H. S. Sell and R. J. McCutcheon, *Impact Resistant Resin-Rubber Blends*, Oct., 1948, issue of *India Rubber World*.

²⁰ "The new Styron 637 designed for improved light stability has a useful life before yellowing which is several times that of previously available commercial polystyrene. It sells for 28½ cents in clear and 34½ cents in colored material, or 11½ cents a lb. over standard formulations. In general, it fabricates in the same fashion under the same

In the 1950 Modern Plastics Encyclopedia and Engineer's Hand Book, the use of high styrene copolymers is spoken of as an accepted method in producing "a new series of high impact plastics" for a great variety of uses. The entire paragraph is reproduced in the margin.²¹

conditions as other Styrons, differing only in that prolonged heating [141] at fabricating temperatures should be avoided. Only one grade is supplied for injection, compression, and extrusion fabrication. Colors are limited to crystal and a range of translucent to opaque whites. Physical properties, with the exception of light stability, are much the same as other high quality polystyrenes.

"The manufacturer points out that light stability of Styron 637 applies to indoor use only. Outdoor weatherability calls for not only light stability, but also other chemical and physical characteristics which are not claimed for this material.

"Styron 637 is recommended as a promising material for diffusion shields, reflectors, etc., in fluorescent lighting particularly, because it will remain white without fading to yellow after a protracted period. In automotive applications, it is recommended for dials, dash panels, escutcheons, and parts likely to be exposed to sunlight inside a car. Clarity and resistance to yellowing make Styron 637 adaptable for molding which are painted on the underneath side, and the crystal compound has color permanence which makes it suitable for lens systems and other optical parts." (R. L. Van Boskirk, Interpretations of Current News, in Modern Plastics, Vol. 7, Dec. 1948, p. 186.)

²¹ "Styrene-butadiene copolymers with high styrene content are providing a new series of high impact strength plastics. This product consists of a blend of a high styrene-butadiene copolymer with any of the natural or synthetic rubbers. Compared [142] with the copolymer alone, the resultant mixture displays excellent impact resistance, low water

There is an article dated 1956 entitled "Synthetic Rubber and Rubber Derivatives" by Donald S. Black, which, without giving credit to any claimed invention, describes butadiene-styrene copolymers of the type claimed in this invention as "the most common and widely used of synthetic rubbers." Significantly, in the description, the proportion of styrene is given as 50 per cent. A portion of the article is given in the margin.²²

absorption, no change in heat distortion point, only slight differences in tensile strength and elongation, and displays good moldability and machinability characteristics.

"Blends can be compounded to customers requirements, uncompounded master batches of resin and rubber can be obtained, or the resin alone is available to be mixed and compounded by the consumer. Some of the applications for this product include textile spools, chemical buckets, photographic trays, chemical piping, and other uses where hard rubber was formerly employed. In addition to the combination of the copolymers and rubbers, formulations have been developed utilizing various grades of cyclized rubber resin." (Styrene Polymers and Copolymers, Modern Plastics Encyclopedia and Engineer's Handbook, 1950, p. 754.)

²² "The most common and widely used of the synthetic rubbers today is the copolymer of butadiene and styrene-GR-S (Government Rubber-Styrene).

"Butadiene and styrene are reacted in a range of ratios between virtually 100% butadiene to 50% butadiene/50% styrene. With products containing higher levels of styrene the polymer takes the form of a resin rather than a elastomer. This allows a wide range of finished products with varied physical [143] characteristics. The physical characteristics can be varied still further by the type of reaction, activator or catalyst, emulsifiers, modifiers, and reaction terminators or short-stopping agents.

The evidence in the record shows that the defendant uses a product purchased from Bakelite, which has the tradename of TMD 2155 and is a mixture of (a) butadiene and (b) polystyrene. As already appears, the inventor is not a chemist. He does not claim discovering something which the chemists did not know. The combination of the two elements under discussion to form a resistant resin compound was known and taught in the art for a long time prior to the date of the conception of the invention in suit. So the upshot of the matter is this:

Coleman did not teach how to combine the two elements in order to develop a material that would have durability when used as a frame. That had been taught in the art long before him. At least the patent to Ditz taught it as far back as 1944.

A patent is evidence of invention at the date of the application as to all matters disclosed.²³ But, for

In addition, the degree to which the monomers are reacted to form the copolymer, i.e., % conversion, definitely affects the finished product.

"During World War II, all of the GR-S produced was manufactured by what is now termed as 'hot' polymerization. The term 'hot' refers to the fact that it was necessary to activate the polymerization at elevated temperatures (approximately 122° F.).

"The monomers (Butadiene and Styrene) are very carefully controlled for purity, because any impurities such as peroxides, sulfides, etc., will adversely affect the reaction time and the finished product. The purity of the butadiene must be at least 98% and the styrene 99 percent." (Modern Plastics Encyclopedia (1956) p. 157.)

²³ *Milburn Co. v. Davis, etc., Co.*, 1926, 270 U.S. 390, 401.

the purpose of determining invention, the date in prior or copending applications showing prior conception in time may be resorted to in order to determine whether the disclosure in them was prior art.²⁴

By 1948, the composition and qualities of various Bunas was a matter of common knowledge. So much so that the 1948 edition of Chambers' Technical Dictionary gives these definitions of the various bunas:

“buna (Plastics). Synthetic rubber manufactured (at first in Germany) by polymerization of butadiene with sodium (hence the name Bu + Na). Buna-N (Perbunan) made from interpolymerization of buta-diene with vinyl chloride, has good aging and off-resisting properties; Buna-S, made from butadiene and styrene, has good mechanical, electrical and aging properties; especially used for tyres.” (p. 120.)

Summary and Conclusion

Coleman was not the first to teach the art to use plastics in the manufacture of battery hold-down frames. His claim to that effect was rejected as not involving invention. Hold-down frames for batteries were long known in the art and have been used in automobiles ever since they began using batteries

²⁴ *Milburn Co. v. Davis etc., Co.*, supra, Note 23; *Yale Hook & Eye Co. v. Interwoven Hook & Eye Co.*, D.C. N.Y., 1929, 33 F. 2d 295, 297; *Stelos Co., Inc. v. Hosiery Motor-Mend Corp.*, 2 Cir., 1934, 72 F. 2d 405, 406; *Dyer v. Coe*, U.S. App. D.C., 1941, 125 F. 2d 192, 195-196; *Helene Curtis Industries v. Sales Affiliates*, 2 Cir., 1956, 233 F. 2d 148, 158. [144]

and means and frames of metal to hold them down have been a part of the equipment of every automobile. Any claim to the frame itself was [133] rejected by the Examiner on the patent to Mabey No. 1,677,789, dating back to July 17, 1928, on an application filed August 6, 1927 and Heitshu, No. 2,360,056, dating back to October 10, 1944, on an application filed December 5, 1941. So the claims are, at most, claims for a hold-down frame made of a particular plastic material. When reduced to this, it is quite evident that the defendant's device does not infringe because the copolymer they use has a low and not a high content of styrene. So, if the claims in suit be limited in this respect, there is no infringement.

However, in the light of the discussion which precedes, I am also of the view that the patent is invalid, and that the Examiner was right when in his final rejection he stated that invention does not lie in recommending either the use of plastic or of one plastic rather than another as a material for a battery frame.

The issued claims limit the invention to a hold-down frame composed of a plastic of a certain composition. What stands in the way of their validity is that their teaching was known to the art and in constructing plastics. And Coleman, in recommending the making of a hold-down frame of a special composition, achieved no invention. The use for which he recommends the composition was not new or non-analogous. With the development of plastics, spurred on by the scarcity of rubber after World

War II, the use of plastics of high resistance was to be expected. The record shows that plastics were being used more and more in making certain automobile accessories. And it was inevitable that those [134] connected with the plastic and the automotive industries would think of using them in a hold-down frame for a battery, because it was dielectric, corrosion resistant and more durable than the metal used by automobile manufacturers.

More, the claims are invalid for indefiniteness because they do not teach the proportions in which the materials are to be used. One skilled in the art could not find in them, without conducting experimentation, the exact proportions to be used in order to achieve durability.²⁵ Again, if invention lies in

²⁵.The words of the Supreme Court in *A. & P. Tea Co. v. Supermarket Corp.*, 1950, 340 U.S. 147 apply here:

“The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable. Elements may, of course, especially in chemistry or electronics, take on some new quality or function from being brought into concert, but this is not a usual result of uniting elements old in mechanics. This case is wanting in any unusual or surprising consequences from the unification of the elements here concerned, and there is nothing to indicate that the lower courts scrutinized the claims in the light of this rather severe test.” (p. 152) (Emphasis added)

Here the proportions were not critical. If they were, they were not disclosed. See *Sears, Roebuck & Co. v. Minnesota Mining & Mfg. Co.*, 4 Cir., 1957, 243 F. 2d 136, 141-142. And see, cases cited in Notes 8 and 14, *supra*.

the use of a polymer of high styrene content, Coleman did not teach that to the art. It was old in the art and he cannot claim what he did not invent.²⁶

It follows that judgment should be for the defendant, that the plaintiff take nothing by its complaint and that the defendant have judgment on its counterclaim as follows:

1. The patent in suit is, and all its claims are, invalid for the following reasons:

(a) Insufficiency of disclosure, because the specifications do not contain "a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and

²⁶ The Supreme Court has stated:

"Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirements as to claims of invention or discovery. The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights. The inventor must 'inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not.' The claims 'measure the invention.' Patentees may reasonably anticipate that claimed inventions, improvements and discoveries, turning on points so refined as the granular structure of products, require precise descriptions of the new characteristics for which protection is sought. In a limited field the variant must be clearly defined." (*General Electric Co. v. Wabash Appliance Corp.*, 1938, 304 U.S. 364, 369)

exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same," do not "set forth the best mode contemplated by the inventor of carrying out his invention,"²⁷ and do not "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention."²⁸ [135]

(b) The patent does not amount to invention over the prior art.²⁹

2. The defendant's device does not infringe any of the claims of the patent in suit because

(a) The claims are invalid;

(b) The defendant's device is not made in accordance with the teachings of the patent in suit, because the copolymer used in the plastic for the construction of the defendant's hold-down frame has a low and not a high styrene content.

Costs to the defendant. No attorneys' fees. Findings and judgment to be prepared by counsel for the defendant under local Rule 7 in accordance with the views expressed in this opinion.

Dated this 21st day of April, 1958.

/s/ LEON R. YANKWICH,
U. S. District Judge. [136]

[Endorsed]: Filed April 21, 1958.]

²⁷ 35 U.S.C.A., § 112, cl. 1.

²⁸ 35 U.S.C.A., § 112, cl. 2.

²⁹ 35 U.S.C.A., § 102(a)(b)(e) and (f).

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 1045-57 Y

VAN BRODE MILLING CO., INC.,
Plaintiff,
vs.

COX AIR GAUGE SYSTEMS, INC.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND FINAL JUDGMENT

Findings of Fact

1. The plaintiff, Van Brode Milling Co., Inc. is a Massachusetts Corporation.

2. The defendant, Cox Air Gauge Systems, Inc. is a California Corporation.

3. Plaintiff manufactures and sells a red [161] battery hold-down frame of synthetic rubber resin material in various sizes, designed to fit over standard storage batteries for the purpose of holding the said batteries in place. The sizes of plaintiff's frame depends on the sizes of the standard battery for which it is designed.

4. The plaintiff's frames are boxed in cartons of various sizes, depending on the size of the frame to be packaged. The boxes of plaintiff emphasize a solid red background with letters and symbols in white.

5. The defendant purchases for resale and sells,

red battery hold-down frames of synthetic rubber resin material from Kravex Manufacturing Corporation, a New York corporation whose principal place of business is in Brooklyn, New York.

6. The frames are also of various sizes, depending on the sizes of the standard batteries for which they are designed, and are boxed in cartons of various sizes depending on the size of the frame. The cartons of the Kravex frame combine yellow and red with yellow as the background.

7. The legends on the plaintiff's carton and on the defendant's carton are different; so are the symbols.

8. The plaintiff's frames and the Kravex frames are of the same sizes because they must fit standard [162] batteries and they are both red.

9. There is no evidence of imitation or deception which would tend to mislead the public as to the source and sponsorship of the goods.

10. All of the elements and features of the Kravex frames and the plaintiff's frame are functional and there is no unique design in the construction or ornamentation of the frames.

11. There is no evidence of actual confusion or tendency to confuse.

12. The frames are boxed in the cartons. They are sold by gas station attendants when asked by an automobile owner to replace the steel hold-down frame which is standard equipment on automobiles. Automotive retailers supply the frames to the gas

stations and in most instances, it is the gas station personnel who suggests to the consumer that the steel frame be replaced by a plastic frame. The plastic frame is priced higher than the steel frame.

13. There is nothing in the record to indicate that the color red on the frame or the colors red and white on the boxes, have become associated in the minds of either prospective customers or suppliers with the plaintiff's product or that either have acquired a secondary meaning which identifies their source and sponsorship with the plaintiff.

14. Since steel is a conductive of electricity and may short circuit the battery, and may also crack the battery case, these disadvantages are overcome when a plastic battery frame of sufficient strength to hold down the battery, which is also flexible and yielding as well [163] as a non conductive of electricity, is employed.

15. Some time prior to December 10, 1951, Sidney Coleman conceived the idea of molding a plastic battery hold-down frame which would be strong enough to hold down a battery without cracking, and which would not have the disadvantages of a steel battery hold-down frame.

16. On June 14, 1955, United States Letters Patent No. 2710660 were issued to the plaintiff, assignee of Sidney Coleman, for a battery hold-down frame of synthetic rubber resin material. Coleman filed application for this patent on December 10, 1951.

17. The plaintiff has since the date of issuance of said patent, been owner of said letters patent.

18. There is no evidence of conception or reduction to practice of the invention claimed in plaintiff's patent prior to January, 1951.

19. The chief objects of the invention as stated in the patent are:

"The main object of the present invention is to provide a hold-down frame made of a material strong enough to resist deformation under tension of the bolts by means of which the hold-down frame is clamped against the battery top, and possessing sufficient resiliency effectively to prevent cracking of the battery top.

Another object of the invention is the provision of a battery hold-down device which is made of a material that has good electrical insulating properties and is, thus, especially suited for use in connection with electrical batteries.

A further aim of the invention is to obtain a hold-down device of the character mentioned which has a relatively high heat resistance, and which is non-corrodible, being thus able to withstand deformation by the heat of the engine, near which it is, of necessity, located, and not being subject to attack by the electrolyte of the battery. [164]

Still another object of the invention is to provide a battery hold-down device of a material which will not adhere to the battery, thereby permitting convenient removal thereof from the battery."

20. The claims are four in number, and are as follows:

"1. A one-piece open battery hold-down frame,

formed of plastic material, comprising sides, ends connecting said sides, and diagonal clamping members at the juncture of said sides and ends, said clamping members being disposed above the top faces of said ends and sides, the plastic material of which said frame is formed comprising polystyrene the mechanical and physical properties of which have been modified by the addition of a Buna S with a high styrene content, the latter imparting to the polystyrene improved heat resistance, building strength and toughness sufficient to withstand pressure to which the frame is subjected in its function to hold the battery on its support, and also imparting to the polystyrene enough flexibility to prevent breakage of the battery top against which said diagonal members bear in the holding down operation.

2. A one-piece battery hold-down frame according to claim 1, including an inorganic filler added to the modified polystyrene to increase the elasticity of the compound.

3. A one-piece open battery hold-down frame formed of plastic material and including elements bearing against the sides and top of the battery, the plastic material of which said frame is formed comprising polystyrene the mechanical and physical properties of which have been modified by the addition of a Buna S with a high styrene content, the latter imparting to the polystyrene improved heat resistance, building strength and toughness sufficient to withstand pressure to which the frame is sub-

jected in its function to hold the battery on its support, and also imparting to the polystyrene enough flexibility to prevent breakage of the battery top against which elements of said frame bear in the holding down operation.

4. A one-piece battery hold-down frame according to claim 3, including an inorganic filler added to the modified polystyrene to increase the elasticity of the compound.”

21. The application for the suit patent originally sought two claims, numbered 1 and 2, which sought a monopoly for the construction of a battery [165] hold-down frame made of plastic. They were finally rejected by the Patent Office Examiner on July 2, 1953.

22. The Examiner's rejection was based on the prior art patents of Mabey, United States Letters Patent No. 1,677,789 granted July 17, 1928; Heitshu, United States Letters Patent No. 2,360,056 granted October 10, 1944; and Leuvelink, United States Letters Patent No. 2,382,428 granted August 14, 1945. The patents of Mabey and Heitshu disclosed battery hold-down frames. The Examiner stated that to cast Mabey's frame with the corner members disposed as in Heitshu or to form the latter's frame as an integral casting as taught in Mabey, would not amount to invention; the further fact that Coleman used a different material, a plastic, did not produce an article meriting patentability; moreover, the use of plastic is shown to be old, in Leuvelink.

23. In addition to the patents cited by the Ex-

aminer, the defendant introduced the patents of Harrison, United States Letters Patent No. 2,170,325, and Thannauser, United States Letters Patent No. 2,306,833, issued December 29, 1942, both for battery hold-down frames. Long prior to the alleged invention of Coleman, battery hold-down frames in the shape, form and design of plaintiff's were old in the art.

24. Coleman appealed to the Board of Appeals of the Patent Office from the Examiner's final rejection, and on March 16, 1955, the Board affirmed the Examiner. The Board found that the claims were unpatentable because they were broader than the disclosure and stated that the claims which were drawn broadly to the entire class of [166] plastic materials were broader than the disclosure in the specification, which merely cited one example of a frame made of polystyrene modified by copolymer, made by the Dewey and Almy Chemical Company under the trade name Darex Copolymer No. 3.

25. On April 2, 1955, Coleman filed a proposed amendment to the patent application, in which he cancelled the two original claims and added four new claims. At the same time an amendment was made to the specification to define Darex Copolymer No. 3 as "an elastic type of synthetic rubber resin made by copolymerizing butadiene and styrene to produce a Buna S with a high styrene content." The four claims originally numbered 3, 4, 5 and 6 are re-numbered as 1, 2, 3 and 4 in the issued patent. Each comprised the following language in

claiming a battery hold-down frame, either directly or by reference:

“The plastic material of which said frame is formed comprises polystyrene, the mechanical and physical properties of which have been modified by the addition of Buna S with a high styrene content.”

26. The patent which was thereafter issued to plaintiff is for an article, a battery hold-down frame, made of a plastic material loosely defined as polystyrene modified by Buna S with a high styrene content.

27. At the time of the Amendment of April 2, 1955, Coleman's attorney submitted as an exhibit to the Examiner, the Dewey & Almy Chemical Co. C-4, dated May 1949, which showed the styrene content of Darex Copolymer No. 3 to be 70%. This exhibit is a part of the Coleman file wrapper. However, no proportions of polystyrene to the copolymer, nor any proportion of [167] butadiene to styrene in the copolymer are given anywhere in the specifications and claims of the issued patent.

28. The Coleman file wrapper does not show any search of the prior art of plastic materials or articles made therefrom on the part of the Patent Office.

29. The defendant produced in evidence a patent not cited by the Patent Office, for a molding composition for battery containers and covers, issued on application of Ditz, United States Letters Patent No. 2,578,518, dated December 11, 1951.

30. The filing date of the Ditz patent is May 26, 1948. It not only recommends the use of plastics for battery containers but actually gives the preparation of two compositions which when tested showed the greatest durability. The preparations given are not only for the ratio of polystyrene to the copolymer but also for the composition of the copolymer itself. Claim 5 of the Ditz patent covers a plastic material of polystyrene modified by a copolymer of butadiene and styrene content in the copolymer ranging from 20% to 50% by weight.

31. Beginning in 1948, the published literature in the realm of the chemistry of rubber resins taught the use of high styrene copolymers to effect greater strength in plastic materials.

32. Modern Plastics magazine, published in December 1948, at page 190, and the 1950 Modern Plastics Encyclopedia and Engineer's Handbook published at least as early as June 16, 1950, at page 755 teach that a high styrene-butadiene copolymer (Darex Copolymer X-34, Dewey and Almy Chemical Co., styrene content 85%) was blended [168] with polystyrene to give tough blends with higher elongation impact strength and good mold flow.

33. Coleman did not teach how to combine polystyrene with copolymer of butadiene and styrene with a high styrene content in order to develop a plastic material that would have durability when used as a battery hold-down frame. That was taught and known in the art long before him, at least as early as December, 1948.

34. The suit patent nowhere defines what is meant by the term "high styrene content" except that the Dewey and Almy Chemical Co. Technical Bulletin of May 1949, shows a styrene content of Darex Copolymer #3 to be 70%. The published literature produced at the trial and admitted in evidence, defines the classification of high styrene copolymer resins as having styrene content ranging from 70% to just under 95% by weight.

35. The entire range of styrene content in styrene-butadiene copolymer varies from almost none to almost 100%.

36. The inventor Coleman testified that to him the term "high styrene content" in reference to the copolymer meant that there was a majority of styrene, more than 50% styrene.

37. The term "high styrene content," as used in the specifications and claims of the patent, means more than 50% styrene.

38. The specification of the suit patent does not contain a written description of the invention and of the manner and processes of making and using it in such full, clear, concise and exact terms as to enable any person [169] skilled in the art to which it pertains or with which it is most nearly connected to make and use the invention, and it does not set forth the best mode contemplated by the inventor of carrying out his invention.

39. The specification does not conclude with one or more claims which particularly point out and

distinctly claim the subject matter which the applicant regards as his invention.

40. Neither the specification nor the claims teach the proportions in which the materials are to be used and one skilled in the art cannot find in them, without experiment action, the proper preparations to be used in order to manufacture a durable battery hold-down frame.

41. The term "high styrene content" as used in the patent is vague and indefinite, and as used in the claims is broader than the applicant's disclosure. Even construing it to mean more than 50% styrene content, it covers too broad a range and gives to the patent holder far more than he would be entitled to.

42. If invention lies in the use of a copolymer of high styrene content, Coleman did not teach that to the art. It was old in the art and the suit patent cannot claim what Coleman did not invent. The patent does not amount to invention over the prior art.

43. The letter of Karl M. Fox, published at page 190, in *Modern Plastics* for December, 1948, and the article on "Styrene Polymers and Copolymers" published on June 16, 1950 in the 1950 *Modern Plastics Encyclopedia and Engineer's Handbook*, at page 754 et seq. teach the claimed elements of Coleman's invention insofar as it is disclosed in the specification and claims of the suit patent, and the mentioned articles are statutory bars having been published more than one year prior to December 10, 1951, the

date of the Coleman application. The patent of Ditz also teaches the claimed elements of the Coleman patent.

44. The frame sold by the defendant is made from a complete molding material known as Bakelite TMD 2155. It comprises a physical mixture consisting of a predominant amount of polystyrene, a minor amount of copolymer of butadiene and styrene and a small amount of pigment to produce a red frame. The copolymer consists of butadiene in the range of 58% to 62% by weight and styrene in the range of 38% to 42% by weight. This is copolymer with a low styrene content.

45. * * * * *

46. The plaintiff began manufacturing its battery hold-down frames on March 10, 1951 and from that date until about July, 1952 its frames were of a plastic material comprising a physical mixture consisting of a predominant amount of polystyrene and an amount of copolymer known as Darex Copolymer #3, consisting of butadiene in the amount of 30% by weight and styrene in the amount of 70% by weight. This copolymer is one with a high styrene content.

47. The plaintiff, during the period of time [171] it used the combination of polystyrene and Darex Copolymer #3, was unable to produce an unqualifiedly commercially acceptable frame in that frames would be discolored and would have a tendency to crack.

48. In or about July, 1952, the plaintiff discontinued the use of polystyrene and Darex Copolymer

#3 because it proved unsatisfactory, and switched over its production to battery frames made entirely of Bakelite TMD 2155, comprising ingredients as set forth in Finding #44, hereinabove. In 1952, the Bakelite material was known as BMSQ 155, the only difference being in the designation.

49. The plaintiff continued using Bakelite TMD 2155 until about November 1952, and during this period of production the material of plaintiff's frames was identical to the material in the Kravex frames. The copolymer used during this period had a low copolymer styrene content.

50. Since about November, 1952, and continuing through the date of trial, the plaintiff manufactured its battery frames of a physical mixture of the aforementioned Bakelite TMD 2155 (originally designated BMSQ 155) and a material furnished by the Monsanto Chemical Co. which is at present designated as Lustrex Hi-Test 89 and was formerly known as LT-1173 Red p 61-235-2 Lustrex LT and LT-1173 Red PIB-2 Lustrex LT. The Monsanto material comprised a physical mixture of a predominant amount of polystyrene and a minor amount of a copolymer of butadiene and styrene. The copolymer consists of butadiene in the range of 60% [172] to 50% by weight and styrene in the range of 40% to 50% by weight. The copolymer in the material of these frames has a low styrene content.

51. In 1952, when the plaintiff changed its production from the mixture of polystyrene and Darex Copolymer #3 over to Bakelite, and later to the

combination of Bakelite and Monsanto materials, it experienced no further difficulty and was able to produce a commercially acceptable battery hold-down frame. Thereafter the plaintiff's frame achieved considerable commercial success. Over \$1,000,000.00 worth of frames were sold. The successful frames were made of polystyrene modified by a copolymer with a low styrene content.

51a. The frames produced with polystyrene and Darex Copolymer #3, the copolymer with a high styrene content, lacked utility and since the specification and claims of the suit patent described and claimed a material modified by a copolymer with a high styrene content, the patent is invalid by reason of lack of utility. Claim 3 on which the plaintiff relies is at most a claim for a hold-down frame made of a particular plastic material modified by a copolymer described as a "Buna S with a high styrene content." The Kravex frame sold by the defendant does not infringe, because the copolymer used in it has a low, and not a high styrene content.

52. All materials used by the plaintiff in its battery hold-down frames were well known in the art prior to plaintiff's use thereof. It is not invention to use plastic or a part of plastic material rather than another material, as a material for a battery frame. In addition, [173] the use of plastic for a hold-down frame was disclosed by Leuvelink prior to Coleman.

53. The use of plastic material to produce a dura-

ble article such as a frame was known in the art and invented by others prior to the alleged invention of Coleman.

Conclusions of Law

1. This Court has jurisdiction of the parties to this action and of the subject matter. (Title 28 U.S.C. Sec. 1338.)

2. There is no evidence to sustain plaintiff's claim for unfair competition.

3. The frame is not sold in unfair competition with plaintiff's frame.

4. The plaintiff has acquired no exclusive right to the use of the color red for battery hold-down frames.

5. The plaintiff has no exclusive right to the size, form and design of its hold-down frames.

6. Not having proved secondary meaning, nor deception, nor likelihood of confusion, the plaintiff is not entitled to relief for unfair competition.

7. The battery frame set forth and defined in the specification and claims of the Coleman Patent No. 2,710,660 lacks utility and is not a patentable invention within the meaning of Title 35 U.S.C. Section 103, and is therefore invalid.

8. The specification of the Coleman Patent [174] No. 2,710,660 is indefinite because it does not teach the proportions in which the materials or the frame are to be used. One skilled in the art cannot find in it, without conducting experimentation, the exact proportions to be used in order to achieve a frame

of durability, and none of the claims appended to the specification particularly point out and distinctly claim the subject matter which Coleman regarded as his invention in accordance with Title 35 U.S.C. Section 103, and the said patent No. 2,710,660 is invalid in its entirety.

9. Assuming that the patent sufficiently disclosed and claimed what Coleman regarded as his invention, it still does not amount to invention over the prior art, and the patent is therefore invalid in its entirety. The subject matter of the Coleman Patent No. 2,710,660 was stated in more than one printed publication in evidence published more than one year prior to the date of application for the patent, and in accordance with Title 35 U.S.C. Section 102, the patent is invalid in its entirety.

10. The frames sold by the defendant do not infringe any of the claims of the patent in suit because the claims are invalid.

11. The frames sold by the defendant do not infringe any of the claims of the patent in suit because the said frames are not made in accordance with the teachings of the suit patent, because the copolymer used in the plastic for the construction of the accused hold-down frames had a low, and not a high styrene content.

12. The plaintiff's complaint should be dismissed in its entirety. [175]

13. The defendant is entitled to judgment on its counterclaim declaring that the suit patent and all of the claims thereof are invalid and that the ac-

cused frame does not infringe any of the claims of the suit patent.

14. Defendants are awarded costs; the attorney's fees are denied.

Dated: May 20, 1958.

/s/ LEON R. YANKWICH,
U. S. District Judge. [176]

In the United States District Court for the Southern District of California, Central Division

Civil Action No. 1045-57 TC

VAN BRODE MILLING CO., INC.,
Plaintiff,

vs.

COX AIR GAUGE SYSTEM, INC.,
Defendant.

FINAL JUDGMENT

The issues in this case came on and were tried on final hearing of pleadings and evidence presented by both sides, and determined by this Court, and said Court having duly rendered its decision and made Findings of Fact and Conclusions of Law, now, it is, [177]

Ordered, Adjudged and Decreed as follows, that:

1. The plaintiff's complaint shall be and the same is hereby dismissed in its entirety.
2. The defendant shall have and is hereby granted judgment on its counterclaim declaring

the United States Letters Patent No. 2,710,660 invalid and not infringed by the plastic battery hold-down frames sold by the defendant (35 USCA, and 102 (a) (b) (e) and (f), §112, cl. 1 and 2).

3. The defendant recover from plaintiff its costs, as taxed, in the sum of \$325.49, but not attorney's fees.

Dated: May 28th, 1958.

/s/ LEON R. YANKWICH,
United States District Judge.

Acknowledgment of Receipt of Copy attached.

[Endorsed]: Filed and Entered May 20, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Van Brode Milling Co., Inc., Plaintiff in the above entitled action hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment docketed and entered in this action on May 20, 1958 and from each and every part thereof.

Dated: June 10th, 1958.

LYON & LYON,
/s/ By R. E. CAUGHEY,
Attorneys for Plaintiff. [184]

[Endorsed]: Filed June 10, 1958.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated, by and between the parties through their respective counsel, that the time within which plaintiff may file its record on appeal and docket its appeal pursuant to Rule 73(g) of the Federal Rules of Civil Procedure may be extended to and including September 8, 1958.

Plaintiff filed its Notice of Appeal on June 10, 1958, and accordingly the aforesaid extension of time is within the 90-day period provided for in Rule 73(g).

This stipulation is not entered into for the purpose of delay, but is occasioned by the fact that the reporter in the trial of this action, a Mr. Samuel Goldstein, has advised plaintiff that it will be at least three weeks before he can provide plaintiff with a copy of the transcript of the trial. Accordingly, [185] plaintiff is not now able to designate the record on appeal or to file its record on appeal or designate its appeal.

Dated at Los Angeles this 23rd day of June, 1958.

LYON & LYON,
/s/ R. E. CAUGHEY,
Attorneys for Plaintiff.

BUCHALTER, NEMER, COYLE &
COOPER,
/s/ By RICHARD B. COYLE,
Attorneys for Defendant.

/s/ EDWARD HALLE,
Of Counsel.

It Is So Ordered, this 8th day of June, 1958.

/s/ LEON R. YANKWICH [186]

[Endorsed]: Filed July 8, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 188, inclusive, containing the original:

Complaint.

Summons.

Answer.

Plaintiff's reply to Defendant's counterclaim.

Notice of taking depositions, filed 11/1/57.

Minute Order 11/4/57.

Stipulation and order re depositions filed 11/8/57.

Notice taking depositions, filed 1/3/58.

Interrogatories propounded to Defendant.

Minute Order 1/15/58.

Stipulation and Order re answering or objecting to interrogatories.

Stipulation and order re depositions filed 2/13/58.

Order to Show Cause.

Minute Order 2/24/58.

Notice taking depositions, filed 3/3/58.

Minute Order 2/2/58.

Minute Order 3/4/58.

Plaintiff's Trial Memorandum.

Minute Order 3/17/58.

Defendant's Trial Memorandum.

Order transferring case under Local Rule 2.

Minute Order 3/25/58.

Minute Order 3/26/58.

Minute Order 3/27/58.

Minute Order 3/28/58.

Opinion.

Minute Order 4/21/58.

Objections to proposed Findings of Fact, Conclusions of Law and Final Judgment.

Bill of Costs.

Findings of Fact, Conclusions of Law and Final Judgment.

Minute Order 5/20/58.

Clerk's notice of entry of judgment.

Stipulation re costs.

Notice of Appeal.

Stipulation extending time to file and docket record on appeal.

Plaintiff's Contents of Record on Appeal.

B. Plaintiff's Exhibits 1 to 86, inclusive.

Defendant's Exhibits A to M, inclusive; Q to Z, inclusive; AA, AA-1.

C. Four volumes of Reporter's Official Transcript of proceedings had on March 25, 1958;

March 26, 1958; March 27, 1958 and March 28, 1958.

I further certify that my fee for preparing the foregoing record, amounting to \$2.40, has been paid by appellant.

Dated: August 22, 1958.

[Seal] JOHN A. CHILDRESS,
 Clerk
 /s/ By WM. A. WHITE,
 Deputy Clerk

In the United States District Court, Southern
District of California, Central Division

No. 1045-57-Y Civil

VAN BRODE MILLING CO., INC.,
 Plaintiff,

vs.

COX AIR GAUGE SYSTEM, INC.,
 Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California, Tuesday, March 25, 1958

Honorable Leon R. Yankwich, Judge presiding.

Appearances: For the Plaintiff: Lyon & Lyon,
by Reginald E. Caughey, Esq., and Kirschstein,
Kirschstein and Ottinger, by David Kirschstein,
Esq., New York 17, New York. For the Defendant:
Buchalter, Nemer, Coyle & Cooper, by Richard B.

Coyle, Esq., and Kane, Kessler and Proujansky, by Albert Proujansky, Esq., and Edward Halle, Esq., New York, New York. [1*]

* * * * *

Mr. Kirschstein: I will call as the first witness Sam Ert.

SAMUEL ERT

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: Samuel Ert.

The Clerk: Spell the last name, please.

The Witness: E-r-t.

Direct Examination

Q. (By Mr. Kirschstein): Mr. Ert, what is your occupation?

A. I operate a battery repair shop at 1339 North Highland, Sam the Battery Man, Hollywood.

Q. What is the business of that shop?

A. I sell and repair storage batteries.

Q. Sell and repair storage batteries?

A. Sell and repair storage batteries, yes, sir.

Q. How long have you had contact with storage batteries?

A. Originally I started in 1911, and I have been in it [21] ever since.

Q. Do you own this shop, Sam the Battery Man?

A. Yes.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Samuel Ert.)

Q. How long have you owned it?

A. Eight years.

Q. Before this shop, what was your business?

A. Selling storage batteries for General Motors, Willard Storage Battery Company, and in this city for Schaefer Automotive.

Q. Are you thoroughly familiar with automobile storage batteries?

A. I think so, yes, sir.

Q. Are you familiar with their operation?

A. The function of a storage battery?

Q. Yes, the function. A. Yes, sir.

Q. Are you familiar with an item known as a battery hold-down frame? A. Yes, sir.

Q. What is a battery hold down frame used for?

A. To hold a battery in place from moving around, you know; hold it in place.

Q. Are you familiar with metal battery hold-down frames? A. Yes, sir.

Q. How long have you been familiar with such frames? [22]

A. Well, since the origination of batteries. Since we had batteries in automobiles, to hold them in place. We had nothing else but metal bands.

Q. How far back does that go?

A. I can say to 1914.

Q. Have these metal frames had any defects?

A. Yes. They are dangerous in certain parts, especially in the last few years where the battery is under the hood, we find metal frames have sulfa-

(Testimony of Samuel Ert.)

tion, corrosion, and possible shortage to cause a fire.

Q. How long has this problem with these frames been in existence?

A. Well, it has been in existence, I think, since storage batteries have been made, sir.

Q. Since they started making them?

A. Yes, since they used them in automobiles. Storage batteries were made before they used them in automobiles.

Q. Have you brought anything with you to illustrate what happens to these metal frames?

A. Yes, sir. I have with me a frame here which we took out of a Ford car which caused a fire. This cable touched this frame here and caused a fire and burned the storage battery, the terminal, right off the battery, your Honor.

The Court: How long ago was that? [23]

The Witness: This was about two or three weeks ago.

I have here——

The Court: I think counsel had better identify them.

The Clerk: It will be marked as Plaintiff's Exhibit 54 for identification.

Plaintiff's Exhibit 55 for identification.

(The exhibits referred to were marked Plaintiff's Exhibits 54 and 55 for identification.)

Q. (By Mr. Kirschstein): Mr. Ert, what is this Exhibit Plaintiff's Exhibit 55 for identification?

A. That is a cable that comes from the starting

(Testimony of Samuel Ert.)

switch to the battery, or rather from the battery to the starting switch, and this is the holder that holds the battery in place.

Mr. Kirschstein: Let the record show that the witness was referring to Plaintiff's Exhibit 54 for identification.

The Court: All right.

Mr. Kirschstein: Your Honor, may I remain here?

The Court: When you show him an object, do that, but don't cover Mr. Goldstein. I would rather you stood there (indicating).

Mr. Kirschstein: Thank you.

The Court: When you show an object to the witness [24] we allow counsel to stand next to the witness.

Q. (By Mr. Kirschstein): Would you explain to the court how the fire occurred with this?

A. Well, due to the rubbing of this rubber—the rubber was worn off and caused the bare wire, the bare wire was laying against the metal frame and caused the shortage, you know, from the battery, you know.

Q. Because metal conducts electricity?

A. Yes.

Mr. Kirschstein: Let the record show that the witness is referring to the cable and to the metal frame.

The Court: All right.

Q. (By Mr. Kirschstein): Have you brought any others with you?

(Testimony of Samuel Ert.)

A. Yes, I brought this one.

This shows what acid fumes will do to a metal frame. This is due to the fact that we have vent holes in a battery to let the acid fumes come out of the battery, and the acid fumes settled themselves on the frame here and cause this white corrosion or sulfation, as you call it.

The Clerk: This will be marked Plaintiff's Exhibit No. 56.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 56 for identification.)

Mr. Halle: Your Honor, at this time I would be very [25] happy at this time to concede that a metal battery frame has certain disadvantages, such as corrosion and short-circuiting, in some instances.

The Court: That is all right.

The Clerk: There has been marked for identification Plaintiff's Exhibit No. 57.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 57 for identification.)

The Court: You know, utility is one of the elements of invention, and I have no objection to counsel showing the utility and superiority of a claimed invention over what was known to the art before.

If they get too far, don't worry, I will stop them even if you don't object.

The Witness: Here is one more in which the acid has eaten into the metal. You see how that

(Testimony of Samuel Ert.)

acid has eaten into the metal. That is caused from the acid getting in touch with the metal.

The Court: And the acid comes from the battery?

The Witness: Yes. And sometimes the metal is eaten away.

The Clerk: That is marked for identification as Plaintiff's Exhibit No. 58.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 58 for identification.)

The Court: Where does that come from?

The Witness: That comes, also, from the battery, on account of it being metal——

The Court: Out of what particular car did you get it?

The Witness: This is out of a Chevrolet, sir.

The Court: These are all cars——

The Witness: This is out of a Ford '56 (indicating).

Mr. Kirschstein: Exhibit 54 is out of a Ford?

The Witness: Yes.

The Court: And those were automobiles you were asked to service?

The Witness: Yes, sir.

The Court: By replacing the battery and the holder, is that it?

The Witness: Yes. We do replacing all the time.

Q. (By Mr. Kirschstein): Mr. Ert, are these frames that you have brought typical examples of what occurred with the metal frames?

A. Yes, sir.

(Testimony of Samuel Ert.)

Q. Is this problem of short-circuiting and corrosion a serious one?

A. Yes; it has been for quite a few years. We had cases of fire due through metal and rubbing through the cable, [27] and we had one just the other day. The party that owns this had quite a considerable fire, and the insurance company had to make good on it.

Q. Does this defect affect the battery itself at all?

A. Yes. Sometimes it burns up a battery. In this case it burned up a battery complete. The rubber case, which is hard rubber, it caused to melt, and the terminal melted on top of the battery.

Mr. Kirschstein: Your Honor, I offer these exhibits in evidence.

The Clerk: 54 to 58 inclusive, your Honor.

The Court: They may be received.

The Clerk: Exhibits 54 through 58 inclusive, Plaintiff's Exhibits, admitted in evidence.

(The exhibits referred to were received in evidence and marked Plaintiff's Exhibits 54, 55, 56, 57, and 58.)

Q. (By Mr. Kirschstein): Mr. Ert, has the problem you have been speaking of been solved?

A. Yes.

Mr. Proujansky: I object to that, if your Honor please.

Mr. Kirschstein: Was the objection sustained, your Honor? [28]

The Court: No. I will overrule it. I think in a

(Testimony of Samuel Ert.)

matter of this character where a person states certain things he may be asked whether in his opinion it was solved. That in itself wouldn't rise above the facts that he gives in support of his theory.

The only way of showing that invention has novelty is to show that the problem existed.

In the most recent case, the Ford Alexander case, there was testimony from people in the field as to the problem of stuck pipe. They testified as to what the problem was, and then they were asked when it was solved, and they referred to certain matters.

The objection is overruled. Go ahead.

The Witness: Yes, the problem was and has been, since this new invention came out.

Q. (By Mr. Kirschstein): What are you referring to by "this new invention"?

A. I beg your pardon?

Q. What are you referring to?

A. I mean Kant-Ker-Rode.

The Court: You had better spell it for him, because these are coined trade names, gentlemen.

Mr. Kirschstein: K-a-n-t-K-e-r-R-o-d-e.

Q. I show you Plaintiff's Exhibit 48 for identification and ask you if this is what you have been referring to. [29]

A. Yes, sir, that is exactly what I have been referring to.

Q. Who makes this Kant-Ker-Rode?

A. The only one I know of is Van Brode, and the only one that ever approached me was Van Brode Milling Company in 1956, I think.

(Testimony of Samuel Ert.)

Q. Van Brode is plaintiff's assignor?

Mr. Kirschstein: Van Brode is the plaintiff herein, your Honor, the assignee of the patent.

The Court: Yes.

Mr. Kirschstein: I should have noted that previously, your Honor.

The Court: That is right. I had it turned around. The owner is Coleman, and the assignor is Van Brode Milling Company.

Mr. Kirschstein: Yes. I should have noted on the record that the plaintiff's ownership of the patent is admitted, as well as the allegations of party.

The Court: Yes.

Q. (By Mr. Kirschstein): How does this Van Brode frame, this type of frame, compare with the metal frame?

A. This is without question the answer to our problems, and has been the answer to our problems of the last 40 years, you might say.

Q. Why is that? [30]

A. Because this is absolutely non-corrosive, it can't corrode, as you claim in your name, and it protects the battery. And it is the same shape as a metal frame, and it can't cause any fire, short, or destruction of the battery.

Q. This frame solved the problem, did it?

A. It solved the problem, and has solved it to my satisfaction very much; and I think my dealers the same way.

Q. Do you sell metal frames?

(Testimony of Samuel Ert.)

A. I do.

Q. Do you sell them now? A. No.

Q. Why is that?

A. Because we have replaced them with——

Mr. Halle: Your Honor, I make objection to that question. He is asking this witness for an opinion as to why he doesn't sell metal frames. I don't think we should be bound by this witness' choice of sale of what he wants to do.

The Court: As this witness is speaking about the replacement of the patented device over other matters in use, I think this merely complements the testimony that he has already given. That is all right.

Mr. Kirschstein: Do you want the question read back?

The Witness: If you please, sir.

(The question referred to was read by the reporter, [31] as follows: "Q. Why is that?")

The Witness: Because, as I have told you, the no-corrode, as we call them, no-corrode, protects the battery from acid fumes, corrosion that comes out on the cable from the battery, from the post, generally, and does not cause a short. That is the main part we are interested in, that it does not cause a short on top of the battery.

May I explain a little further, your Honor.

At the battery, if there is leakage, it is spilled, it will spill right on the automobile, and this frame will not discharge, it will not make a contact with the car direct.

(Testimony of Samuel Ert.)

Q. (By Mr. Kirschstein): In other words, has the market for the metal frames as a replacement decreased?

Mr. Halle: Here, again, I object——

The Court: That is a little too broad. I want to limit him to his own experience.

Q. (By Mr. Kirschstein): In your experience, Mr. Ert, has the field in metal frames been decreased substantially by the advent of the plastic frames?

Mr. Proujansky: I object to that, too, your Honor. There is no foundation. He says he doesn't sell metal frames any more. How would he know whether it has decreased? [32]

The Court: I think he has given us the reason why he has.

We don't want to go into the other man's business.

The question of practical success depends not upon what the other man does, but what you do. It is a positive. If there is invention—what is that expression we all use? It is merely a dead weight if there is no invention. But he is not in a position to talk about the entire market, unless you qualify him.

We had in the Ford Alexander case one man representing the Hancock Oil Company that testified to a saving of nearly a million dollars a year from using a tool, but he testified from the experience of his own company.

So this man having testified that he has aban-

(Testimony of Samuel Ert.)

doned the sale, that is as far as he can go. He can't testify as to the condition of the market.

If you think it is material, you had better prove it with somebody who goes around and sells these frames to various dealers.

He is only one dealer.

Q. (By Mr. Kirschstein): Mr. Ert, do you sell these frames to dealers? A. Yes, sir.

Q. And do you go around in the trade?

A. The same as I sell storage batteries, sir, I sell [33] also Kant-Ker-Rode to gas stations and dealers, sir.

The Court: All right.

The Witness: Some of the dealers of General Motors Company I sell the Kant-Ker-Rodes to.

Q. (By Mr. Kirschstein): Based on your experience going around selling these things, has the market in the metal frames decreased?

A. I can't tell you——

Mr. Proujansky: I object——

The Court: He is going to answer no. Wait a minute.

The Witness: I can't answer that question because I do not know what the manufacturers of equipment are doing.

The Court: But you are doing a better business with this new frame, is that it?

The Witness: That is exactly right.

The Court: All right.

Q. (By Mr. Kirschstein): What color are the metal frames?

(Testimony of Samuel Ert.)

A. Well, they are painted black.

Q. Have they always been that color?

A. Yes, outside of somebody goes in the paint shop and has it repainted.

Q. But ordinarily they are black, is that correct?

A. They are black.

Q. When you see a red hold-down frame, what does that [34] mean to you?

Mr. Halle: I am going to object to that. This goes into the question of unfair competition, and he is asking this witness, When you see a red frame, what does that mean to you?

A red frame is obvious; it is a red frame.

Mr. Kirschstein: I think the witness can give the answer as to what it means to him. I have a right to prove what it means to someone in the trade.

Mr. Halle: This witness has already——

The Court: I think the way the question is framed it is too broad. In view of the fact that you put him on more or less as an expert, and he testified as to what color the metal frames are, he may testify in what color this comes, and whether you see it in any other product, and the rest would be a matter of inference.

Q. (By Mr. Kirschstein): Mr. Ert, what color have you seen these plastic frames in?

A. Well, I seen them in red.

Q. Just in red? A. Just in red.

The Court: Red alone, or red in combination with others?

(Testimony of Samuel Ert.)

The Witness: Just in red, your Honor. [35]

Q. (By Mr. Kirschstein): Is that for the whole time that you have had any acquaintance with these plastic frames, they have always been red?

A. Yes. The only thing I know of, that I seen them and sold them, and any one on a car has always been red.

Q. (By Mr. Kirschstein): In your visits to customers and to the trade, in trying to sell these frames have you had occasion to see them displayed anywhere?

A. Do you mean—I didn't get that question.

Q. Have you seen these plastic frames displayed anywhere?

A. Yes. In every gas station, pretty near.

Q. How were they displayed?

Mr. Halle: Your Honor, before the witness answers, I don't think it is a part of the case against the Cox Air Gauge, the defendant here, to show how anybody other than Cox displays its frames.

Mr. Kirschstein: Your Honor, I have a right to show secondary meaning here.

The Court: The object of this testimony is to show that this color has been associated with it. I will say now that they will have to show something more, because you can almost take judicial notice around the industrial world that I have never seen a farm tool that wasn't painted red, or farm [36] machinery. In fact, notoriously they adopt that.

I will say right now that you will have to show more, as I said in the Chun King case, than the

(Testimony of Samuel Ert.)

mere choosing of red. It may well be that this combination can't turn other than red. A man can't appropriate the color red.

Mr. Kirschstein: Your Honor, I think I can say without contradiction that it will be established that these frames can be made in any color, practically.

The Court: That is all right.

Mr. Kirschstein: My point in this testimony is to establish the very facts on which I hope the conclusion of secondary meaning can be drawn, namely, that they are displayed. And that is what I am trying to establish.

The Court: You will have to show under the California cases more than red. You will have to show imitation of symbols; show if a man looked at it he would mistake it for the other man's. Just as in Chun King Sales, they had the same color scheme, just as in the tuna fish case they had the same pale blue. The court said they had to have imitation of symbols that would be deceptive to the person.

I am merely saying you shouldn't emphasize too much on the red.

Of course, I will allow you to prove the various steps that constitute it.

You will notice the Court of Appeals while reversing [37] me on the patent case said I took into consideration all the elements, not only color, imitation of symbols, and likelihood of confusion and the like, which are elements which go to constitute unfair competition, and which dovetail in with some

(Testimony of Samuel Ert.)

of the other cases which have been decided in this Circuit.

All right. Go ahead.

I think he had answered the question, didn't he?

(The last question was read by the reporter, as follows: "Q. How were they displayed?")

The Court: Just describe what you saw.

The Witness: Hanging on the wall.

Q. (By Mr. Kirschstein): Out of their cartons?

Q. In a carton, and sometimes loose, without the cartons.

The Court: How are these things packed?

The Witness: They come in—we get them in 12 in a case, but they are all packed in single cartons with the name Kant-Ker-Rode on them.

The Court: And then the man in the station would take one and hang it up just as he would a can of polish?

The Witness: Yes. Like a hose, you know, hang them on a rack, or pile them on a rack, or like a can of oil on the shelf. [38]

The Court: Or some of the other accessories that he carries?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Kirschstein): Would you explain to the court what these parts of the frame do, what they touch?

A. They touch the top of the battery and press down on the battery straight down so that the battery does not shift this way or that way.

(Testimony of Samuel Ert.)

The Court: What holds the battery in place?

The Witness: This holds it in place, but two bolts go through here, and this Kant-Ker-Rode holds it exactly in the correct position.

The Court: What is the bolt attached to?

The Witness: The bolt is attached to the frame of the automobile.

The Court: Which has a place for the battery?

The Witness: Yes. Where the original metal frame used to be, we put the same kind of a frame with the same bolt, only we use what we call a no-corrode.

Q. (By Mr. Kirschstein): This section here bears against the top?

A. The top of the battery.

Q. And this section against the side? [39]

A. Yes, sir, the sides of the battery.

Mr. Kirschstein: Let the record show that I was referring to the undersurface of the top of the frame of Exhibit 48 for identification, and to the inner surface of the sides and ends of the frame when the witness was testifying regarding bearing against the top and sides of the battery.

The Court: I didn't hear the witness state or anyone state, or a stipulation, that that is an exemplar of the patented device.

Mr. Kirschstein: There isn't any question about that, is there?

The Court: The record doesn't contain it.

Mr. Kirschstein: Do you wish to raise a question about it?

(Testimony of Samuel Ert.)

Mr. Halle: This is a frame manufactured by the plaintiff in this case, your Honor. It is marked with U. S. Patent No. 2,710,660. But it is our contention that it is not manufactured under the patent by reason of its composition.

It is also our contention that it is not manufactured under the patent by reason of some structural features of it.

The Court: I have been at this for 23 years. I know what your next step is going to be. I haven't reached that step yet. All I wanted to know is if the record shows what we are talking about.

Mr. Halle: That is of plaintiff's manufacture.
[40] They make two types of frame.

The Court: Regardless of any claim?

Mr. Halle: Yes.

The Court: In the Ford Alexander case the contention was that the commercial product wasn't constructed according to the patent, so I am used to these contentions.

All I want to know is that you are dealing with something that the plaintiffs claim is an exemplar constructed according to the teaching of the patent.

Mr. Kirschstein: I offer this in evidence as Plaintiff's Exhibit 48.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 48 in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 48.)

Mr. Kirschstein: No further questions.

(Testimony of Samuel Ert.)

The Court: Cross examine.

Mr. Halle: May I have this marked?

The Clerk: Defendant's Exhibit B marked for identification.

(The exhibit referred to was marked Defendant's Exhibit B for identification.) [41]

Cross Examination

Q. (By Mr. Halle): I show you Plaintiff's Exhibit 55 in evidence, which you described as a cable from the battery switch to the battery?

A. Yes, sir.

Q. Now, I show you Defendant's B for identification and ask you if that is the same kind of cable.

A. No, sir. That is a rubber cable (indicating), and this seems to be plastic.

Q. But does it serve the same function?

A. The same function, yes, sir.

Q. And the cable that you have in your hand?

A. Is a much better cable than that one.

Q. In other words, the one I just showed you, Defendant's Exhibit B for identification is a better one?

A. Yes.

Q. Would you tell me what color it is?

A. It is red.

The Court: All except the metal?

Q. (By Mr. Halle): The metal has a metallic finish?

A. Yes.

Q. Have you seen many red battery cables in your business?

(Testimony of Samuel Ert.)

A. Yes, sir, hundreds of them. I have about 500 [42] in stock, to be honest with you, sir.

Mr. Halle: Your Honor, I would like to offer Exhibit B in evidence.

The Clerk: May it be admitted?

The Court: Do you think it has been sufficiently identified as to the function it serves?

Mr. Halle: I am not offering it as to function; just as to color, that it is an item widely used in this gentleman's business and it is red in color.

The Court: All right.

The Clerk: Defendant's B in evidence.

* * * * *

Q. (By Mr. Halle): Now, Mr. Ert, I believe you testified that the plastic frame which was shown to you is an example of frame that solved the short circuits, corrosion, and so forth? A. Yes.

Q. Do you know of any other frame that may have been made before that frame that solved that problem? [43]

A. No, I haven't, sir, to be honest with you. This frame when it first came out we were quite impressed with it a few years ago, and we have never had any plastic or anything like that before.

Q. Are you familiar with a frame made by the Acitex Company?

A. Never heard of the company, sir.

Q. I am going to show you Defendant's Exhibit C for identification and ask you to look at the frame described on that exhibit.

A. Well, sir, it might have been sold on the

(Testimony of Samuel Ert.)

East Coast, and I sold on the East Coast, but I never heard of it. I worked in Philadelphia, had a shop up there, and to be honest with you I never seen a rubberized cover. This is the first time I seen it. It might be darn good.

Q. You say you have never seen a rubber-like cover. I am not limiting the question to that particular frame as exhibited there. Have you seen any frame made by anybody with either a rubber or plastic cover on it?

A. Now, yes; lately I have.

The Court: No. Before now.

The Witness: Before I had Kant-Ker-Rode, I had never seen or sold any rubberized or any plastic cover.

Q. (By Mr. Halle): You had never seen one nor sold one? [44]

A. Never seen one nor sold one, and I spent 35 years in this business.

Q. I show you Defendant's Exhibit D for identification and ask you whether you have ever seen this frame.

A. I sell them. Willard. Willard sells them to me. But that came out after——

Q. I didn't ask you that. I just asked you whether you ever saw it.

A. Yes, I saw it.

That is made out of steel and covered with plastic, and sold through the Willard Company.

Mr. Halle: I offer this in evidence, your Honor.

The Court: It may be received.

Mr. Caughey: For what purpose?

(Testimony of Samuel Ert.)

I object to it unless the purpose is stated. There must be some reason to offer evidence. For the color, or what?

Mr. Halle: I put it in both on the question of color and as a development in the art.

Mr. Kirschstein: When?

Mr. Caughey: Is it a kind of a metal frame?

Mr. Halle: We have some testimony by one of your witnesses about a metal frame covered with plastic that he knew about some years ago.

The Court: He said it came in afterwards. [45]

Mr. Halle: But I would show from some other testimony that this type of frame——

The Court: No. C you haven't offered because he has not identified it?

Mr. Caughey: He has identified that as one he is familiar with, but my question is as to how it is material except on the question of color.

The Court: As a matter of fact, his answer helped you, by saying that this appeared after your device appeared on the market.

Mr. Caughey: That is correct. As exemplifying the testimony of the witness, in that connection I have no objection.

The Court: You know me, I am not bound by purpose. If it is material and bears on any of the issues, and as we are dealing with the art and development, I think that a frame which is part metal and part plastic material may be interesting as showing the process of development. Also dealing

(Testimony of Samuel Ert.)

with the color red, and he shows you something else that is red.

The Clerk: May D be admitted in evidence?

The Court: Yes. The objection is overruled.

The Clerk: D in evidence.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit D.)

Q. (By Mr. Halle): In your experience, are many frames such as Defendant's D sold today?

A. Yes, sir.

Q. Of the same color red? A. Yes.

Q. Mr. Ert, are you familiar with the prices of the plastic frames that you sell? A. Yes, sir.

Q. Are you also familiar with the prices of steel frames? A. Yes, sir.

Q. Which cost more?

A. The plastic frames.

Q. What is the average price of a steel frame?

A. We sell them for a dollar and a half.

Q. What is the average price for a plastic frame?

A. Some of them a dollar and a half and some of them two dollars and three dollars; it depends on the size. You see, six volts is a dollar and a half, and some 12 volts are two dollars, and some 12 volts are three dollars.

Q. But the steel frames are all a dollar and a half?

A. Not all. Some of them are two and a half.

I am just trying to think what Willard told us to sell them for, rather, the price list on them. [47]

(Testimony of Samuel Ert.)

I have given them up.

I think it is between one and a half and two and a half. I can't exactly tell you the figures.

Q. But the plastic costs more?

A. The plastic costs more in the 12 volt.

Q. How about you, when frames are sold to you, are you familiar with the prices of steel and the plastic frames? A. Yes.

Q. What would be the average price of a steel frame if you would buy one for your business to sell for resale?

A. About 50 per cent, sir.

Q. 50 per cent of the sale price? A. Yes.

Q. Would the same be true for plastic?

A. Close to it, sir. Not quite. I think it is 40 or 33 $\frac{1}{3}$. Well, let's figure it out. I can tell you pretty near the figures.

The Court: These would be included in what we call among the oil companies T.B.A., tires, batteries, and accessories, these would be accessories?

The Witness: Yes.

The Court: That the average station would carry?

The Witness: Yes.

The Court: And the mark-down on those is very, very——

The Witness: Very small, the mark-down on them. [48]

The Court: Is it 50 per cent?

The Witness: That is the distributor's price. And then we sell them back to the T.B.A. dealers, and they sell them to the gas stations. The gas sta-

(Testimony of Samuel Ert.)

tion is the one that actually gets the biggest profit on it.

Q. (By Mr. Halle): It is a fact, is it not, that you make a bigger profit when you sell a plastic frame?

A. I wouldn't say that, sir, no. I don't think—the way people are buying, T.B.A. dealers, you make a very small margin of profit. Like, for instance—I might give you an illustration if I am allowed to, your Honor.

The Court: Yes. You are doing very well.

The Witness: I sell to the wagon peddlers, the Kant-Ker-Rode hold-down costs me 60 cents, I am selling it to him for 70, so you see the mark-up, the profit on that is only if he buys in dozen lots, two or three dozen at a time. But if he bought individually I wouldn't sell them. I would rather not sell anything if I have to lose money on it.

Q. (By Mr. Halle): I misunderstood you. I thought you sold at retail to the purchaser.

A. I sell at retail, too, sir. Then I get \$3.00.

Q. You make a higher profit at retail on plastic than steel? A. Oh, yes, sir.

Q. That is what I wanted to know. [49]

A. I am sorry. I misunderstood you, sir.

Q. Are you familiar with the equipment as it is sold by this General Motors dealer that you spoke about? You say you sell some plastic frames to a General Motors dealer? A. Yes.

Q. Do you know how his cars come through from Detroit? A. Metal frames.

(Testimony of Samuel Ert.)

Q. They have steel frames?

A. Just metal like we showed you.

Q. Would that include the Cadillac?

A. Cadillac, Buick, Olds, Pontiac, Chrysler products, any of them.

Q. Isn't that true of all cars manufactured in Detroit, they come through with steel frames?

A. With steel frames, yes.

Q. Even today? A. Even today.

The Court: You ought to tell Ed Sullivan about it.

Mr. Halle: May I have this marked, please.

The Court: I didn't want to break the continuity of the cross examination, but if it is going to be extensive, we have already run over 10 minutes, and this is just the first day of the case and I have other things to do. According to my custom, I like to complete an examination, but if it is going to be extensive I will have him come back at 2:00. [50]

Mr. Halle: I don't believe so. I don't believe it will take another five or ten minutes.

The Court: All right.

The Clerk: Defendant's Exhibit E marked for identification.

(The exhibit referred to was marked Defendant's Exhibit E for identification.)

Q. (By Mr. Halle): I give you Exhibit E, which is a little plastic bag containing some articles in it. Are you familiar with those articles?

A. No, sir. To tell you the truth, I don't know what they are.

(Testimony of Samuel Ert.)

Q. I believe you say you are an expert in replacing batteries in cars? A. That's right.

Q. Do you know anything about spark plug cables?

A. I do, but I am not working on that. I am an exclusive battery man.

Q. Did you ever see a spark plug on a motor?

A. Yes.

Q. Did you ever see a cover on a spark plug?

A. Certainly.

Q. A rubber cover? A. Yes, sir. [51]

Q. A plastic cover?

A. Yes, I think I did.

Q. Now, I ask you to look at that little bag that I gave you, transparent bag, and see if you can find a spark plug cover in it?

A. I am quite sure this should be the one right here, I think (indicating).

Mr. Halle: The witness indicates an L-shaped object.

Q. Now I am picking on an object about two inches long here and pretty nearly a half inch wide, and it has got several ridges running around it; do you know what that is?

A. It might go into the distributor, sir.

Q. But you don't know?

A. I am not in the motor tune-up division or anything like that, sir. I gave myself the name Sam the Battery Man, specializing on batteries, and I won't even start on generators. I send them back to the dealers.

(Testimony of Samuel Ert.)

Q. The L-shaped object that you identify as a spark plug cover, have you seen many of those in your business?

A. To be honest with you, no.

Mr. Halle: I have no further questions, your Honor.

The Court: All right. Any redirect?

Mr. Kirschstein: Just a few short questions, your Honor.

The Court: All right. [52]

Mr. Halle: Your Honor, I just have one exhibit I wanted to show him.

The Court: All right. Go ahead.

Q. (By Mr. Halle): This has been identified as Plaintiff's Exhibit 29 for identification. I hand you the mentioned exhibit and ask you if you have ever seen a frame like that before.

A. Yes. That is Kant-Ker-Rode.

Q. And does that have the name Van Brode on it? A. Yes.

Q. And that is another type of frame in addition to the one that you identified before as a Kant-Ker-Rode frame, is it not?

A. It don't look any different.

Q. I ask you to look at the top corners.

A. It has the reinforced corners. But otherwise it is practically—I wouldn't say I am a judge of that, I don't pay that much attention. Kant-Ker-Rode and Dont-Ker-Rode, and that is the way we sell them.

Q. You have handled these frames and you can't

(Testimony of Samuel Ert.)

tell how many you have handled with corners and without corners?

A. No, because my boys sell them. I have them in stock. I do the buying; they do the selling.

Mr. Halle: No further questions. [53]

Redirect Examination

Q. (By Mr. Kirschstein): This Defendant's Exhibit D is a covered frame, is it not; it is a steel frame covered with something?

A. Steel frame covered with some kind of material. I think it is plastic.

Q. You think it is plastic it is covered with?

A. Yes.

Q. And I believe you said this came out after the plaintiff's frame?

A. That's right. Willard Storage Battery brought it out after you folks came out with yours.

Mr. Kirschstein: Can I take this out of its cover?

Mr. Halle: I would like to keep it intact as an exhibit.

Q. (By Mr. Kirschstein): Can this frame be made in the various necessary sizes for different batteries?

A. Yes.

Q. It can? A. Yes, sir.

Q. Can you tell the difference by looking between this frame and this frame (indicating)?

The Court: What is this and this? You are not identifying it for the record. The record doesn't know any "this" or "that" unless you identify it.

Mr. Kirschstein: Yes. [54]

(Testimony of Samuel Ert.)

Q. I have in my left hand Plaintiff's Exhibit 48, and in my right hand Defendant's Exhibit D; can you tell the difference by looking at them?

A. Certainly.

Q. I have in my left hand the same thing, Plaintiff's Exhibit 48, and in my right hand Plaintiff's Exhibit 42, for identification; can you tell the difference between them by looking at them?

Mr. Halle: Your Honor, I object to this on the ground that whether he can tell the difference by looking at those frames from a distance of 10 feet has no bearing on this case.

The Court: Even if he is nearsighted he can see that far away.

The Witness: They are both Kant-Ker-Rode.

Mr. Proujansky: The exhibits speak for themselves.

Mr. Kirschstein: They are both Kant-Ker-Rode, is that your answer?

The Court: What is that?

The Witness: They are Kant-Ker-Rode.

They both look alike, they are both Kant-Ker-Rode.

Mr. Halle: I move that the reference to Kant-Ker-Rode be stricken from the record.

Mr. Kirschstein: I would like to explain something here. [55]

As your Honor said, your Honor indicated there should be something more than color on this unfair competition count. I am demonstrating graphically

(Testimony of Samuel Ert.)

that that is true, because Exhibit 42 for identification is one of the defendant's frames.

Mr. Halle: Your Honor, I could hold up a steel frame painted red and hold it 10 feet from the witness and say they look alike to me.

Mr. Kirschstein: But this is not a steel frame; this is a plastic one.

Mr. Caughey: Just a second.

This isn't arguing the case; this is evidence, so I suggest that Mr. Halle, if he wants to prove something, that he prove it in the proper way.

The Court: Just a minute.

Mr. Halle: Your Honor, I made this objection—I said that any reference that the witness made to any frame being Kant-Ker-Rode, held up like that, be stricken.

The Court: I will strike it out.

You can say what they look like to you.

The Witness: They look alike.

Mr. Halle: All right. There is no question about that.

The Court: All right, gentlemen.

Mr. Kirschstein: I will offer in evidence [56] Plaintiff's Exhibit 42 for identification.

The Court: All right, it may be received.

The Clerk: Plaintiff's Exhibit 42 in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 42.)

The Court: 48 is what, the accused device?

The Clerk: That is in evidence already.

(Testimony of Samuel Ert.)

Mr. Kirschstein: 42 is the accused device, and 48 is the plaintiff's device.

The Court: Is the patented device?

Mr. Kirschstein: Yes.

The Court: All right.

I got it turned around.

Mr. Kirschstein: It is not difficult to turn them around.

Mr. Halle: There is no contest about that.

The Court: No comments. We argue the cases in my court when we get through. We don't argue *chemin faisant*. Patent lawyers notoriously like to argue their cases *chemin faisant*, and New Yorkers have to learn that.

Have you finished with this witness?

Mr. Kirschstein: Yes.

Mr. Halle: I want to ask him about these frames that he testified to as being similar. [57]

Recross Examination

Q. (By Mr. Halle): Exhibit 48 and Exhibit 42. First let me give you Exhibit 48 and ask you whether there is any part in the construction of that frame which is not necessary for its use as a battery hold-down frame?

A. You have got me there, because I couldn't answer that question. That is something more than I can explain. I only know—I am not an expert on that.

Mr. Halle: Your Honor, they qualified him as an expert to show the parts that bear down and do this and do that.

(Testimony of Samuel Ert.)

The Court: But you are asking for particularization.

He testified that they look alike.

Mr. Halle: He testified he has been experienced with installing battery frames since 1914.

The Witness: 1911.

The Court: If he can answer the question, all right. I know he won't.

The Witness: You want to know what the difference is between—what was your question? Pardon me.

The Court: Go back to the question. Listen to the question and then we will all go to lunch if you answer quickly.

Q. (By Mr. Halle): The frame which you have in your hand here, which is Exhibit 48, when you use that frame to install a battery and hold a battery down in a car, are there any [58] extraneous parts within that frame which are not needed? I am talking about the physical appearance of the frame. A. No.

Q. Of course not.

There are two holes for the bolts?

A. That's right.

Q. And there are parts that bear down on the battery to hold it in place? A. That's right.

Q. Nothing extra? A. No.

Q. Now, I ask you the same question, and would your answer be the same insofar as Exhibit 42 is concerned?

(Testimony of Samuel Ert.)

A. I would give you the same answer. The only thing is you have a little more reinforcing.

Q. The same answer except one has more reinforcement on the hole? A. Yes.

Q. But that is still needed there to put the frame down?

A. Yes. I am sorry I couldn't answer the first question.

Mr. Halle: That is all.

Mr. Kirschstein: Just one question, your Honor.

The Court: All right. [59]

Redirect Examination

Q. (By Mr. Kirschstein): Does this frame, Defendant's Exhibit D, have everything you need to hold a battery in place?

A. Yes; but we quit it because it cuts into the battery on the edges.

Mr. Kirschstein: That is all I have, your Honor.

Mr. Halle: That is all, your Honor.

The Court: All right. You may be excused, sir.

The Witness: Thank you, sir, your Honor.

The Court: 2:00 o'clock, gentlemen.

(Thereupon, at 12:20 o'clock p.m., a recess was taken to 2:00 o'clock p.m.) [60]

Tuesday, March 25, 1958, 2:00 P.M.

The Clerk: Case 1045-57, Van Brode Milling Company vs. Cox Air Gauge System, for further trial. All parties present, your Honor.

The Court: Call your next witness, Mr. Kirschstein.

Mr. Kirschstein: Your Honor, I have several depositions I would like to read into evidence.

Mr. Caughey: Your Honor, you may recall I called you about the question of depositions, and you indicated if we had time that that could be done.

As a matter of fact, we only have, I believe, one additional witness, other than the witness who was on the stand. Most of this case is by deposition.

The Clerk: Mr. Caughey, we will mark the deposition as your exhibit before you read it.

The Court: We like to give it a number, and as long as we have time, rather than give them to me to read, I would just as soon hear them read. One of you take the place of the witness and the other the interrogator.

Mr. Caughey: Of course we are not going to read all of the deposition, but we will indicate which pages will be read.

The Court: But we like to give them a number.

The Clerk: Deposition of Morton Bean has been [61] marked for identification as Plaintiff's Exhibit 59.

(The exhibit referred to was marked Plaintiff's Exhibit No. 59 for identification.)

Mr. Kirschstein: Shall I read from the original, your Honor?

The Court: Yes.

Just state for the record the witness, and then ask the questions and let him answer until an objection is made.

Mr. Kirschstein: The witness' name is Morton

Bean. The deposition was taken February 27, 1958.

The Court: Where is he from?

Mr. Kirschstein: It is covered by the questions, your Honor.

The Court: All right.

(Whereupon counsel read the deposition of Morton Bean, as follows:)

DEPOSITION OF MORTON BEAN

“Q. Would you state your name and address and age, please?

A. Morton A. Bean, 26 Bonnie Meadow Road, Scarsdale, New York. I am thirty-six.

Q. Would you state what your occupation is, please?

A. I am an executive in the firm of Quality Electric Products and I also act as salesman for one of the territories, that territory being Westchester up into southern Connecticut. [62]

Q. What is the business of Quality Electric Products?

A. Quality Electric Products is an automotive warehouse servicing the jobbers exclusively.

Q. Could you name some of the types of products that you sell, just generally?

A. Yes. Some of the lines that we represent on the warehousing basis are the Tung-Sol Company——

Q. I meant the type of product that you sell, just generally.

A. Well, there are many different items that we warehouse. Some of them come under the category

(Deposition of Morton Bean.)

of electrical; some of them come under the category of chemicals.

Q. Are they all automotive? A. Yes.

Q. Are you familiar with the business of Quality Electric Products?

A. Yes, sir, very much so.

Q. And I take it you run that business?

A. To a great extent, yes.

Q. How long have you been in the automotive trade?

A. I entered the automotive trade approximately 1940. In 1941 I went into the Service. Somewhat late in 1943 I got out of the Service, at which time I went back into the automotive business. The business, of course, [63] remained during that time.

Q. What was the business you were with from the beginning, the name of it?

A. The name at that time was Quality Electric Products Corp.

Q. In other words, it is the same business that you are with now? A. Yes.

Q. Except that then it was a corporation?

A. Then it was a corporation and, frankly, at that time we were more or less in the electrical end more than we are now. We specialized in the automotive electrical specialties.

Q. In the course of your experience in the automotive trade, have you become familiar with an item known as a hold-down for a storage battery of a car?

A. Yes. As far back as 1940 when I was in the

(Deposition of Morton Bean.)

business, we at that time were handling a battery hold-down.

Q. What was that hold-down made of?

A. At that time it was metal, a metal hold-down.

Q. Are you familiar with the metal hold-downs, their quality? A. Yes, I am.

Q. Do you know of any defects in them?

A. Well, there were quite a few defects as far as [64] a metal hold-down was concerned. No. 1, the metal, of course, is a direct conductor of electricity and consequently, when a metal hold-down is used there is very often an amperage drop, especially if the metal has become corroded.

In the second place, quite often when a metal hold-down is used and put on a battery improperly, it will break the battery case. It will break the top of the battery case if it is applied forcefully.

Q. You mentioned "corrosion"; was that a problem with metal frames?

A. Corrosion is a definite problem on a metal battery hold-down and that is why you are seeing plastic hold-downs on the market. To qualify this, many of the companies that have formerly made metal hold-downs have in some way attempted to cover them to eliminate the corrosion of the hold-down.

Q. What is that corrosion due to, if you know? In other words, is it the chemical of the battery that causes it or is it the air or what, or water or what—if you know?

A. Let's say this: I don't qualify as a battery

(Deposition of Morton Bean.)

expert, but the acid will corrode the metal. No. 2, just the fact that the steel itself or that the metal is exposed to the elements eventually you will get a corrosion of the hold-down. [65]

Eventually they do break. The corrosion causes the metal to eat away until such time as the battery hold-down breaks.

Q. Have you actually seen some of these defects on the metal hold-downs?

A. Oh, yes, many times, many times.

Q. You started to mention before some companies whose lines you sell and I interrupted you. You only named one of many, isn't that true?

A. That is right.

Q. Are you familiar with the plastic battery hold-down frames made by the plaintiff in this case, who is Van Brode Milling Company, Inc., of Clinton, Massachusetts?

A. Yes, I am, sir.

Q. When did you become familiar with them?

A. Why, we became familiar with them early in the year of 1955, at which time we contacted the company with the idea of representing them on a warehousing basis.

Q. You mean, to sell those frames?

A. That's right.

Q. Did you commence to sell those frames?

A. Late in 1955 we consummated our arrangements with them and from that time up until the present we are [66] warehousing their merchandise here.

Q. You are still selling them?

A. Yes, sir.

(Deposition of Morton Bean.)

Q. How did that product go over?

A. Why, we had immediate response to it. They had previously been selling them in the New York area and we picked up right there and have had a great deal of success with the line.

Q. What do you attribute that success to?

A. Well, I attribute the success to the fact that the plastic hold-down—and that was the first plastic hold-down on the market—was so much better than the metal.

Q. What do you mean by that?

A. In other words, the fact that the plastic hold-down eliminated the difficulties that you formerly got with the metal hold-down.

Q. How about the product itself? Is it a good quality product, in your opinion?

A. Yes, sir. The product is an excellent one. In regards to figures of the approximately—and this is rough—200,000 that we have sold.

Q. 200,000 frames?

A. 200,000 frames, units. We have had approximately 25 to 30 bad ones, at a maximum. When I say “bad,” they [67] broke due to improper installation.

Q. I show you Plaintiff’s Exhibit 33 for identification and ask you to examine it carefully.

(Handing exhibit to witness.)

And tell me if you can recognize it.

A. Yes, this is a Van Brode hold-down, No. CD-10.

(Deposition of Morton Bean.)

Q. I show you Plaintiff's Exhibit No. 32 for identification and ask you if you recognize that?

A. This is the box that the hold-down is shipped in.

Q. Do you know how these plastic frames of the plaintiff's are asked for in the automotive trade?"

Mr. Halle: Your Honor, I object to that question as to "do you know how these frames are asked for in the automotive trade?"

The frame and the box for the frame have just been provided, and it has got a name on it.

The Court: We cannot tell. It may have acquired another name. Many people in various industries apply words not exactly etymologically correct.

Overruled.

(Whereupon counsel resumed the reading of the deposition of Morton Bean, as follows:)

"A. Well, at the present time, of course, they [68] are primarily asked for as battery hold-downs. At one time, and very often at the present time, they are asked for as "red plastic battery hold-downs."

Q. What does that mean to you when someone asks for red plastic battery hold-downs?"

Mr. Halle: I object to that question, your Honor.

The Court: Overruled.

(Whereupon counsel resumed the reading of the deposition of Morton Bean, as follows:)

"The Witness: Well, it means to me that they want the Van Brode hold-down.

Q. Do they rely on getting that in purchasing?

(Deposition of Morton Bean.)

A. They do. Of course, if they call me, they know that that is the hold-down that I carry.

Q. Have you, during the time that you have been in the automotive business, continued — by “you,” I mean your company — continued to sell the metal hold-down frames?

A. No, sir, we did not. We found that just as soon as we took on the Van Brode hold-downs, that the demand for the other frame had completely dropped off to the point where it was nil. In fact, we had placed one order for one customer for a number of these metal hold-downs and found that the company had gone out of business—the company who made the metal hold-downs had gone out of business.” [69]

Mr. Halle: I move that answer be stricken, your Honor. It is not responsive to the question.

The Court: That is not a good objection if it is material. It is merely an explanation of the drop. The motion will be denied.

(Whereupon counsel resumed the reading of the deposition of Morton Bean as follows:)

“Q. What do you attribute that decline for demand for metal hold-down frames to?”

Mr. Halle: Again, I object.

The Court: What was that question?

Mr. Kirschstein: “What do you attribute that decline for demand for metal hold-down frames to?”

The Court: Overruled.

I presume it relates to the community and the place he is doing business.

(Deposition of Morton Bean.)

(Whereupon counsel resumed the reading of the deposition of Morton Bean as follows:)

“A. The demand is simply because the plastic hold-down is vastly superior to the metal ones, and if a man [70] can buy something that is better for the same or cheaper price, obviously he is going to do so.

Q. Do you know who created the market in the automotive field for plastic frames?”

Mr. Halle: I object to that, your Honor, too. It calls for an opinion of this witness.

The Court: Read the question.

Mr. Kirschstein: “Do you know who created the market in the automotive field for plastic frames?”

The Court: That is pretty broad. He is familiar only with the experience in a particular locality. I will sustain the objection.

(Whereupon counsel resumed the reading of the deposition of Morton Bean as follows:)

“Q. Your company, Quality Electric Products—is that a company?

A. At the present time it is a partnership.

Q. It is a partnership; are you one of the partners? A. Yes, I am, sir.”

Mr. Kirschstein: Next, your Honor, is cross examination.

The Court: Counsel for defendant may read that. [71]

Mr. Halle: Will you act as my witness, Mr. Caughey?

Mr. Caughey: I would be delighted.

(Deposition of Morton Bean.)

(Whereupon counsel resumed the reading of the deposition of Morton Bean as follows:)

“Q. Have you had any experience east of the Mississippi—pardon, west of the Mississippi River?

A. No, sir.

Q. Are you familiar with the type of hold-down that is placed on a car as original equipment as it leaves the manufacturers' factory?

A. No, I am not.

Q. Do you come in contact with automobile users in connection with your business?

A. No, I do not. In fact, that will explain why I'm not familiar with the hold-down that come on the car directly from the car manufacturer. I do not sell car dealers. I only sell the jobbers.

In other words, I do not see the cars when they come into the showrooms and go out of the showrooms.

Q. When you say jobbers, would you explain how your particular segment of the industry works?

I take it you get the battery hold-down frames directly from the manufacturer?

A. That is right. [72]

Q. And you warehouse it?

A. That is right.

Q. Then you sell to jobbers?

A. That is right.

Q. Who in turn do the jobbers sell to?

A. They in turn sell either over the counter or they sell to car dealers; they sell to mechanics, gas stations, garages, fleet accounts.

(Deposition of Morton Bean.)

Q. Do you recall the companies that supplied you with metal hold-down frames?

A. Yes, there is one company that I had in mind called the Callahan Company, and I believe that was spelled C-a-l-l-a-h-a-n. They are in—or they were in Massachusetts.

Q. When was the last time your company purchased the metal hold-down frames?

A. I would say somewhere around 1948 or 1949. I naturally could look those records up, if you require me to do so.

Q. I believe you stated that you first started purchasing the plaintiff's hold-down frames sometime in 1955?

A. That is right.

Q. What product did you use in that interim period?

A. We had no hold-down during that time at all.

Q. You didn't sell a hold-down?

A. No. [73]

Wait a minute; I beg your pardon. I'm sorry. I'm wrong about that. During that period of time we were handling a hold-down made by the Rubco Company, out of Brooklyn, New York. This was a metal hold-down with a rubberized covering. We handled that hold-down up until the period of time when we took on Van Brode.

Q. Could that Rubco hold-down have had a plastic covering on it?

A. No.

Q. You are sure it was rubber?

(Deposition of Morton Bean.)

A. Yes, sir. It was a rubberized impregnation that was actually baked on.

Q. I believe you stated that in installing a metal hold-down frame, if it was improperly installed it would break the battery case; is that correct?

A. Yes.

Q. What experience have you had in installing metal hold-down frames?

A. I have had none. I stated before that I was not a qualified mechanic or——

Q. You also stated that as far as plastic hold-down frames are concerned, they broke when they were improperly installed; is that correct?

A. Yes, I stated that out of approximately 200,000 that I had seen, about 30 of them had been broken. This is [74] due to a hold-down that is put on a battery where the hold-down is longer than the battery case, and in applying pressure you get a tremendous amount of leverage and a clumsy man could break a hold-down.

Q. Could a clumsy man also break a battery case when installing a plastic hold-down?

A. No, I don't believe so, because the plastic hold-down is going to give a great deal more than the metal one will.

Q. Do you know what the battery cases are made out of?

A. The top of the battery case is made out of a—it's a rubberized bakelite.

Q. Do you know which is stronger, the rubber-

(Deposition of Morton Bean.)

ized bakelite of the battery case or the plastic in the hold-down frame?

Mr. Kirschstein: You mean as against each other?

Q. As against each other.

A. Would you rephrase—

Q. I will reframe the question.

Do you know whether the bakelite of the battery case that you spoke about, whether that is stronger or weaker than the plastic in the plaintiff's battery frame?

A. Well, let me say this, Mr. Halle: As I stated before, I'm not a qualified battery man, nor was I brought here to testify as such. I've primarily sold the units and [75] act as a sales organization, not as an installation man.

Q. I take it you don't know the answer to that question?

A. Not quite; that is right.

Q. Out of approximately 200,000 metal frames

— A. Not metal frames.

Q. Let me finish the question.

A. I'm sorry; yes, sir.

Q. You have stated that out of 200,000 plastic frames that were installed through your organization, or that your organization sold, approximately 25 or 30 were installed in a manner in which the frames were broken? A. Yes.

Q. You have also had experience in selling metal frames? A. Yes, sir.

Q. What would you say the percentage of dam-

(Deposition of Morton Bean.)

age to battery cases would be in installing metal frames?

A. The amount of metal frames that we had sold was negligible, compared to the amount of plastic that we had sold.

Q. About how many metal frames has your company sold?

A. I would say that during a period of time that we had perhaps a thousand.

Q. And out of those thousand metal frames—and I take [76] it that would be the period from 1940 to 1948; am I correct?

A. Approximately, yes.

Q. Out of those 1000 metal frames, how many instances of complaints had you had where the battery cases were broken?

A. We are going back ten years. It's a little hard to remember that. Frankly, I can't recall. We are going back a little bit too far. We have had too many items to sell during that period of time.

Q. Would it have been a large number?

A. Why, no, not any more than the plastic ones, and I'll tell you why; because the metal frames that we had—that we were selling, were adjustable to the size of the top of the battery, and a man could adjust it to the actual top of the battery, so that there would not be any hang-over.

Q. But in any event, you cannot give me a percentage figure for broken battery cases in installing metal frames?

A. I'm afraid not.

(Deposition of Morton Bean.)

Q. Now, you handle products of many companies?
A. Yes, sir.

Q. Are some of those products metal?

A. Yes.

Q. And are some of those products plastic?

A. Yes.

Q. Do you consider yourself well experienced in the [77] automotive industry?

A. Yes, in my own field.

Q. Did there come a time in the sale of products such as yours when there was a sort of a revolution, a change-over from metal to plastic in many items?

A. No, not necessarily; I wouldn't say so. If an item adapted itself to plastic and it was better in plastic than it was in metal, as it was obvious here in the plastic hold-downs, then it was changed over. However there are many things here that are carried exactly the same as it was in '40.

Q. When new plastics were developed by the suppliers of plastic, metal objects that were adaptable to being made out of plastic were made out of plastic?
A. Probably." [78]

* * * * *

(Whereupon counsel resumed the reading of the deposition [81] of Morton Bean as follows:)

"Q. I believe you stated that the frames come to you in boxes; is that correct?

A. Yes, sir.

Q. Would Exhibit 32 be representative of the box that all the frames come in?
A. Yes."

(Deposition of Morton Bean.)

Mr. Halle: Your Honor, Exhibit 32 in this deposition is Plaintiff's Exhibit 31 for identification on the trial. This red box.

The Court: All right.

(Whereupon counsel resumed the reading of the deposition of Morton Bean as follows:)

"Q. Just different sized boxes for different sized frames? A. Yes.

Q. But the same color, same printing, and they all say "Kant-Ker-Rode Plastic"?

A. That is right.

Q. Do you ship the frames out in boxes, too?

A. Just the way they come in. In many instances we don't even open the case, whereas the case usually carries twelve frames each individually boxed. However, at no time would we ever take the frame out of the box that it comes in, the small box. We would ship it exactly this way." [82]

* * * * *

"Q. Do you know when the Kravex frame was put on the market?

A. Not to the date, but I would approximate somewheres about a year ago. At that time I first started to see it on a number of jobbers' shelves."

* * * * * [84]

"Q. You are familiar with the fact that both the plaintiff and the Kravex Company put out plastic battery hold-down frames? A. Yes.

Q. When you want to buy a plastic battery hold-down frame, and you want the Van Brode product, meaning the plaintiff, you know where to get it?

(Deposition of Morton Bean.)

A. Are you asking that as a question, sir?

Q. Yes.

A. I go to my stock and take one. I don't know what you mean by that.

Q. You know where to order it from?

A. Yes, of course.

Q. You have never received a Kravex frame when you order Van Brode?

A. I don't write to Kravex for my Van Brode frames." [85]

* * * * *

"Q. How many different types of automotive products do you handle? [92]

A. I would say we warehouse for about 25 companies.

Q. And the number of different products that you handle? A. Are considerable.

Q. Over 100? A. Oh, yes.

Q. Are they all black? A. Oh, no."

* * * * *

"Q. Do you handle battery cable?

A. Yes, sir, we do. That is right; the Crescent Company has a red plastic battery cable.

Q. Do you sell a considerable quantity of that?

A. Yes.

Q. Do you know of any company that makes red spark plug caps?

A. There may be some; I do not know. We don't handle spark plug caps."

* * * * *

"Q. I hand you Plaintiff's Exhibit 26 for iden-

(Deposition of Morton Bean.)

tification and ask you if you have ever seen a product like that before?

A. I've seen the product as far as being the spark plug cap; yes, I've seen it.

Q. Have you seen it in different colors?

A. Yes.

Q. Including the color red?

A. Yes." [94]

* * * * *

The Clerk: There has been marked for identification a deposition of Abraham Goldin, No. 60 for identification.

Mr. Kirschstein: This deposition was taken on February 28, 1958:

(Whereupon counsel commenced the reading of the deposition of Abraham Goldin as follows:) [99]

DEPOSITION OF ABRAHAM GOLDIN

"Q. Would you state your full name, address, and age, please?

A. My name is Abraham Goldin; I live at 1121 Fenwood Drive, Valley Stream, New York; I am thirty-eight and a half years old.

Q. Will you state what your occupation is, please?

A. Manager of Mitchell Auto Supply.

Q. Do you have any association with London Tire Company, Inc.?

A. London Tire Company is the mother company of Mitchell Auto Supply.

(Deposition of Abraham Goldin.)

Q. What is the business of Mitchell Auto Supply?

A. We wholesale auto supplies to the jobbers.

Q. What is the business of London Tire?

A. London Tire is a tire business.

Q. How long have you been associated with the automotive trade?

A. I came here in '41 and worked for about three years in Strauss Stores—about twenty years.

Q. What are your present duties with Mitchell?

A. I buy the majority of the merchandise. I make up all the deals. I set the selling prices. I set the policy for the company.

Q. Would it be correct to say you are familiar with the business of Mitchell? [100]

A. Definitely.

Q. By "Mitchell," I am referring to Mitchell Auto Supply. A. Right.

Q. Are you familiar with an item known as a "metal battery hold-down frame"?

A. Yes, I am.

Q. How long have you been familiar with metal battery hold-down frames?

A. About seventeen years.

Q. In your experience have you become aware of any defects in the metal frames?

A. Except for them corroding and possible shorting out of batteries, that's about it.

Q. Have you found that to be a problem with metal frames? A. I'd say "yes."

(Deposition of Abraham Goldin.)

Q. How long have you known about the corrosion and shorting problems?

A. Ever since I have been handling them.

Q. How long is that?

A. Seventeen years.

Q. Have you ever observed these defects on the frames, the metal frames? A. Yes.

Q. Many times? [101] A. Many times.

Q. Are you familiar with the plastic battery hold-down frame made by Van Brode Milling Company, Inc.? A. Yes.

Q. I show you Plaintiff's Exhibit No. 33 for identification and ask you if you recognize that item? A. Yes.

Q. What is that?

A. That is a No. CD-10 battery plastic hold-down frame.

Q. Is that a Van Brode frame?

A. Van Brode, yes.

Q. I show you Plaintiff's Exhibit No. 32 for identification and ask you if you can recognize that? A. That is the box.

Q. The box for this frame, Exhibit 33?

A. Yes.

Q. How long have you been familiar with the plastic frames made by Van Brode Milling Company, Inc.?

A. About three or four years.

Q. Does Mitchell Auto Supply sell these frames?

A. Yes.

Q. How do the plastic frames compare with the

(Deposition of Abraham Goldin.)

metal ones, as far as the defects you mentioned before with respect to the metal frames? [102]

A. They don't corrode, and there is no possibility of cable shorting out on that particular material.

Q. What type of product have you found these plastic frames made by Van Brode Milling Company, Inc., to be as far as quality?

A. It is a good item.

Q. Have the sales of the metal frames been affected by the coming onto the market of the Van Brode plastic frames?"

Mr. Proujansky: I believe that question was withdrawn. There is no answer to it.

Mr. Caughey: That is correct.

(Whereupon counsel resumed the reading of the deposition of Abraham Goldin as follows:)

"Q. Do you sell as many metal frames as you used to? A. No.

Q. Have your sales of metal frames decreased?

A. Yes.

Q. To what do you attribute that?"

Mr. Proujansky: I object to that question, your Honor.

The Court: Overruled. [103]

I take these questions as being limited to the locality and the space and the experience of the man.

Here is a man who has been here and who has handled the product for this company, and therefore he is not giving a generalized answer, but the

(Deposition of Abraham Goldin.)

sales with which he is familiar from that store, and that is the way I interpret it.

The difficulty is when you take a deposition there is no one there who can re-arrange or reframe the question and therefore both sides are at a disadvantage, and I always bear that in mind.

All right.

(Whereupon counsel resumed the reading of the deposition of Abraham Goldin as follows:)

“A. Well, first of all, we are pushing the plastic much harder than we are pushing the metal, because of the profit structure there. That is it. That is, as far as I am concerned.

Q. In other words, your sales of the metal have declined since you started selling the plastic frames?”

Mr. Proujansky: I object to the form of the question on the ground it is leading.

The Court: It is merely a summation of the other. I will sustain the objection because it doesn't include the [104] reason. I will sustain the objection. It is merely a repetition of what he has already told us, and in his answer he has put in one qualification which the question doesn't have. I will sustain the objection to that question.

(Whereupon counsel resumed the reading of the deposition of Abraham Goldin as follows:)

“Q. Do you know who created the market in plastic frames?

A. I think you will have to word that a little different, because I don't know what you mean.

(Deposition of Abraham Goldin.)

Q. There is a market for plastic frames at the present time, isn't there? A. Yes.

Q. Do you know what company or corporation created that market?

A. I think Mitchell Auto Supply was very essential in creating the market. Is that what you are trying to—

Q. I mean, what manufacturer of plastic frames."

Mr. Proujansky: I object to the form of the question, your Honor. It calls for a conclusion.

The Court: Overruled.

(Whereupon counsel resumed the reading of the deposition [105] of Abraham Goldin as follows:)

"A. Van Brode."

Mr. Kirschstein: That is all the direct.

(Whereupon counsel resumed the reading of the deposition of Abraham Goldin as follows:)

"Cross Examination

Q. (By Mr. Proujansky): In the course of your business, did you ever use metal battery hold-down frames?

A. Did I ever use them, personally?

Q. As a part of your business operations.

A. Yes.

Q. When you say you used them personally, what do you mean by that?

A. That I installed them on cars.

Q. You installed them on cars?

(Deposition of Abraham Goldin.)

A. That is what I meant by "using them, personally."

Q. Did you, in connection with your duties in Mitchell Auto Supply ever install metal battery hold-down frames on automobiles?

A. Yes, I did.

Q. Is Mitchell Auto Supply in the retail business? A. No, but London Tire is.

Q. In the course of your duties for London Tire, you [106] installed metal battery hold-down frames?

A. I showed the other boys, and also installed the other frames, that's right.

Q. You indicated there were certain defects in the metal battery hold-down frames?

A. Yes.

Q. How did those defects come to your attention?

A. When you take out the old battery, all this corrosion, all this acid is spilled over onto the metal, and causes corrosion there. So sometimes they would be cracked in half, or they would be so badly corroded it would be hard to take it off the battery itself.

Then there is the other defect. That was the shorting defect. If the cable, which is generally rubbing up against the frame of the battery, the hold-down of the battery wears away the metal there, if it is the positive cable, it could wear out and cause a ground there, so that is going to short it out.

(Deposition of Abraham Goldin.)

Q. These defects of which you speak, you noticed with respect to battery hold-down frames that you did not sell, but were on cars that came in to you for replacement; is that a correct statement?

A. Say it slow. I am not so smart.

Mr. Proujansky: Will you repeat the question, please? [107]

(The pending question was read back by the reporter.)

The Witness: Can I talk off the record.

(Discussion off the record.)

A. There would be no way of me knowing whether I sold these battery hold-downs originally or not, because I may have sold it to a customer, who in turn sold it to the consumer.

Q. Did you ever notice in the course of your business duties any defective plastic battery hold-down frames? A. Yes.

Q. What was the nature of the defect that you observed in the plastic battery hold-down frames?

A. That they would break.

Q. How many of these broken frames have you seen in the course of your activities for Mitchell Auto Supply, approximately?

Mr. Kirschstein: Are you talking about plastic?

A. Maybe a hundred.

Q. That last answer referred to plastic battery hold-down frames? A. Yes.

Q. Do you know the color of the Van Brode plastic hold-down frames? A. Yes. [108]

Q. What is that color? A. Red.

(Deposition of Abraham Goldin.)

Q. Have any of the Van Brode plastic battery hold-down frames ever been shipped to you in any color other than red? A. No.

Q. Was there any time that you saw a yellow Van Brode plastic battery hold-down frame?

A. No.

Q. Have you ever seen anywhere else on the market, other than in your place of business, any plastic battery hold-down frame made by Van Brode in any color other than red? A. No.

Q. Do you still sell metal battery hold-down frames? A. Yes.

Q. Do you have customers that prefer metal battery hold-down frames to plastic ones?

A. Yes.

Mr. Proujansky I have no further questions.

Redirect Examination

Q. (By Mr. Kirschstein): You mentioned broken plastic frames. Are these frames that were broken in shipping here, or were they broken on the cars or what? A. Broken on the cars. [109]

Q. Can you estimate how many plastic frames you have sold since you started selling them?

A. An estimate?

Q. Yes.

A. It would be about eight thousand a year.

Q. Do you know why—

A. Did I say "eight thousand a year"?

Q. Yes.

A. It is more than that; it would be about twelve thousand a year.

(Deposition of Abraham Goldin.)

Q. Do you have any idea how the broken plastic frames got broken?"

Mr. Proujansky: "I object to that, unless you particularize."

Apparently the question was withdrawn.

(Whereupon counsel resumed the reading of the deposition of Abraham Goldin as follows:)

"Q. Do you know whether they were broken because they were defective as sold, or whether they broke because the person putting them on misused them, or broke them because he didn't know how to put them on?"

Mr. Proujansky: I object to the question because it [110] calls for a conclusion, your Honor.

The Court: Overruled.

(Whereupon counsel resumed the reading of the deposition of Abraham Goldin as follows:)

"A. I am not an engineer. I couldn't answer it, not truthfully.

Q. Do you know whether any are broken by people misusing them, putting them on wrong?

A. I couldn't answer that either.

Q. You mentioned that some of your customers still prefer the metal frames? A. Yes.

Q. Have the number of customers that preferred metal frames declined since the plastic frames came into existence? A. Yes.

Q. Would you say greatly?"

Mr. Proujansky: I object to the question.

The Court: It has no meaning.

Mr. Kirschstein: I will read back.

(Deposition of Abraham Goldin.)

The Court: Yes, please.

Mr. Kirschstein: "Have the number of customers that preferred metal frames declined since the plastic frames came into existence?"

A. Yes. [111]

Q. Would you say greatly?"

Mr. Proujansky: I object to the answer unless we have specific figures.

The Court: Of course I don't know what the answer is. It is a question of degree.

Overruled.

(Whereupon counsel resumed the reading of the deposition of Abraham Goldin as follows:)

"Q. You can answer.

A. Yes, it declined greatly.

Q. You referred before to having seen some metal frames that were broken or corroded?

A. Yes.

Q. Have you ever heard complaints in the trade from your customers, or even competitors about the corrosion problem on metal frames?"

Mr. Proujansky: I object to the question on the ground it is hearsay.

Mr. Kirschstein: I believe, your Honor, what he heard in the trade is an exception.

The Court: Read it to me again, please.

Mr. Kirschstein: "Have you ever heard complaints in the trade from your customers, or even competitors about the corrosion problem on metal frames?" [112]

The Court: That is permissible. To show the

(Deposition of Abraham Goldin.)

state of the art at the time of the particular invention can only be proved by persons who have used the product, and a person who sells the product to whom complaints are made can testify that he heard complaints from others.

Overruled.

(Whereupon counsel resumed the reading of the deposition of Abraham Goldin as follows:)

“Q. You can answer.

A. Yes, we have discussed it at various times.

Mr. Kirschstein: That is all.

Recross Examination

Q. (By Mr. Proujansky): Of the plastic frames that you have handled, what percentage of these have been in the wholesale trade, and what percentage have been in the retail trade?

A. 99½ per cent wholesale and ½ per cent retail.

Q. The defective frames which you have come in contact with, that is, the plastic ones, is that over the whole length of your experience with the plastic frames, or was that concentrated in any particular period?

A. It is over my whole time that I am handling them.

Q. Did your experience come in connection with your wholesale sales, or in connection with your retail sales? A. Wholesale sales. [113]

Q. So that all of the defects that you noticed, or that came to your attention, came in the 99½

(Deposition of Abraham Goldin.)

per cent, and none of them came in the small portion of retail sales?

A. I would say that is true.

Q. Have you ever returned any plastic battery hold-down frames to Van Brode Milling Company for credit? A. Yes.

Q. Would you know how many frames you have returned for credit?

A. On a guess, you mean, approximately?

Q. Approximately.

A. Approximately a hundred.

Mr. Proujansky: I have no further questions."

Mr. Kirschstein: That is the end of this deposition, your Honor.

Your Honor, the next deposition is a deposition that was taken in a New York case, and there is a stipulation on file in this case that it may be read here.

The Court: All right.

Mr. Kirschstein: I am not familiar with your procedure, your Honor. I don't know whether to mark the stipulation or not.

The Court: We mark it. When they are transcribed into the record, there are various methods of identification, [114] and that is another method of identifying it.

The Clerk: What Mr. Kirschstein has in mind is the stipulation contained in the body of this deposition, which is to the effect that this deposition may be used in the case we are now hearing.

Mr. Kirschstein: No. It is contained on a separate paper that was filed in court.

The Court: That is all right.

If counsel remembers it, that is all right.

The Clerk: It will be in the minutes, your Honor.

Deposition of Samuel J. Kraver marked for identification as Plaintiff's Exhibit 61, it being read per stipulation.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 61 for identification.)

Mr. Kirschstein: This deposition was commenced on August 7, 1957, your Honor.

(Whereupon counsel commenced the reading of the deposition of Samuel J. Kraver, as follows:)

DEPOSITION OF SAMUEL J. KRAVER

"Q. Would you state your name, address, and age, please?

A. Samuel J. Kraver, 4944 Hawthorne Lane, Great Neck, New York.

Q. Are you connected with Kravex Manufacturing Corp.? A. Yes.

Q. What is your connection? [115]

A. I'm president.

Q. Are you a director of that company?

A. Yes.

Q. Are you a stockholder? A. Yes.

Q. The principal stockholder? A. Yes.

Q. What is the business of Kravex Manufacturing Corp.?—which from now I will refer to as "Kravex" for brevity.

(Deposition of Samuel J. Kraver.)

A. We sell to the automotive trade, we sell to the bicycle trade.

Q. What, exactly, do you sell?

A. We have subcontractors. We have our own molds; we have various contractors making items for us.

Q. You mean you get requests to make a certain item, and then you make it?

A. No. Different things that I think I want to go into, I go into.

Q. How long has Kravex been in business?

A. Originally I was Kravex Specialty Company. I formed that in 1938. It became Kravex Manufacturing Corporation in 1947.

Q. The previous concern was a company; is that it? A. Yes.

Q. Has Kravex always made the same products that they are making today? [116]

A. We have more or less specialized in rubber and plastics.

Q. Since the corporation was incorporated?

A. Right.

Q. How about the company?

A. The company was in the jobbing business. Kravex Specialty Company were jobbers.

Q. So there was a change in the type of business when you incorporated; is that right?

A. That's right.

Q. What are some of the items that Kravex makes?

The Witness: You mean to list individual items?

(Deposition of Samuel J. Kraver.)

Mr. Kirschstein: Yes.

A. I make various rubber products in the automotive trade. I make plastic products in the automotive trade and the bicycle trade.

Q. What are some of those products?

A. In plastic products I make bicycle handlebar grips, which are used by the automotive people as well as the bicycle people. I make various plastic products also used in the automotive trade and the bicycle trade.

Q. What is the principal place of business of Kravex?

A. 273 Van Sinderen Avenue, Brooklyn, New York.

Q. What is the state of incorporation? [117]

A. What do you mean?

Q. What state is Kravex Manufacturing Corp. incorporated in? A. New York State.

Q. I believe you said that you have your own molds and make your own products?

A. I don't make them, I contract them out.

Q. That's what you meant by "contract"?

A. Yes. I happen to have molders make the stuff for me.

Q. You own the materials for making the products? A. I own the molds.

Q. You own the molds? A. That's right.

Q. What kind of molds are you referring to?

A. Rubber molds, plastic molds.

Q. The molds for making—

(Deposition of Samuel J. Kraver.)

A. Plastic dies, rubber dies, rubber molds, plastic molds.

Q. As I understand it, these molds and dies are used by contractors of yours to make products for you, which you sell? A. That's right." [118]

* * * * *

"Q. (By Mr. Kirschstein): Do you make battery hold-down frames? A. That's right.

Q. How long have you made them?

A. Oh, I would say I've made it approximately four months.

Q. You have been making them for four months?

A. Yes. [120]

Q. Did you bring a sample of the ones that you make? A. Yes.

Mr. Kirschstein: Would you produce that, please?

The Witness: Yes.

(Witness handed plastic battery hold-down frame to Mr. Kirschstein.)"

The Court: Was that identified?

The Clerk: As Plaintiff's Exhibit No. 1 to the deposition, and in this case it is Plaintiff's Exhibit No. 3.

The Court: All right.

Another red frame?

The Clerk: Yes.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver, as follows:)

"Q. I show you Plaintiff's Exhibit 1 for identification and ask you to identify it. A. Yes.

The Witness: What shall I say?

Mr. Halle: This is a battery hold-down frame

(Deposition of Samuel J. Kraver.)

produced by the witness as a manufacture of his company.

Q. This is the frame that you have been making for the last four months? A. That's right.

Q. Are there other sizes of this frame? [121]

A. Yes.

Q. Are there other shapes of it? A. Yes.

Q. What are the other shapes? How would they vary from this? A. Longer, wider.

Q. How about the location of the parts with the holes? A. With the holes? They vary.

Q. They vary in position?

A. They vary in position.

Q. That is a feature of the type of battery it is used on; is that correct?

A. That's right. We just followed what was used on the manufacturer's equipment. We went through the various cars and just copied their styling as far as fit was concerned. After all, this is supposed to serve a purpose.

Q. Now, as I understand your testimony, you have never made any battery hold-down frames; is that right? A. No, that's right.

Q. Do you own the molds for making these frames? A. Yes.

Q. Who is the contractor that makes the frames for you? A. Gary Enterprises, Inc.

Q. Are they the only contractor that makes these frames for you? [122] A. Yes.

Q. Has any other contractor ever made them for you? A. No.

(Deposition of Samuel J. Kraver.)

Q. How did you come to make these battery hold-down frames?

A. I'm always looking for items to make. In our business you have to come out with new items from time to time. It's very important.

This is just another item in the course of making additional items for my company.

Q. Who actually made the molds? Did you make them yourself, or what?

The Witness: Do I have to answer that?

Mr. Halle: Yes, you can answer that.

A. Made by Gary. Gary made the molds for me.

Q. Who designed the molds? A. Gary.

Q. If I understand you, Gary designed the molds and made them, and they belong to you—and by “you” I mean your concern.

A. That's right.

Q. And they, under contract to your concern, make the battery hold-downs from the molds?

A. Yes. [123]

Q. Did you tell them what you wanted designed when they designed them? A. Yes.

Q. In other words, you approached them to make the molds?

A. I went out to various cars. I got original hold-downs that I bought from the various car dealers——

Q. What do you mean by “original” hold-downs?

A. The metal hold-down that originally came on the car. That's where I got the sizes from. That's

(Deposition of Samuel J. Kraver.)

where I got the designs from. That's where I got the shape from.

Q. What did you do with that?

A. We took those hold-downs and made them out of plastic.

Q. Did you take to Gary the actual metal hold-downs? A. That's right.

Q. You bought some and took them to them?

A. That's right.

Q. What are your hold-downs made of?

A. Plastic.

Q. What type of plastic, do you know the name of it, the composition?

The Witness: We can submit that, can't we?

Mr. Halle: Yes.

(Mr. Halle handed paper to the witness.)

Mr. Halle: First of all, would you tell [124] Mr. Kirschstein whether or not you are familiar with the chemistry of these items?

The Witness: Well, I'm not a chemist.

Mr. Halle: But you did something to find out what your product is made of?

The Witness: Oh, yes. I knew that there was a plastic hold-down on the market. I had seen it.

Q. (By Mr. Kirschstein): What plastic hold-down was that?

A. I knew there was a plastic hold-down being made by Van Brode.

Q. You mean before you came out with this one?

A. Before I came out with it.

Q. Yes.

(Deposition of Samuel J. Kraver.)

A. And I also knew that they had a patent on it. The patent is written on the item itself, that they were patented.

I don't go around—It was not my intention to infringe upon Van Brode's hold-down. Before I went into the manufacture of this hold-down I had a copy of their patent and read what it stated, and in that patent copy it stated that the thing that they had patented above everything else was a formula which the hold-down was made out of.

Q. You mean the formula for the plastic?

A. The formula for the plastic, the ingredients.

The first thing, I instructed Gary to make sure that the product that we used—the formula—would not be the same as Van Brode's, so that there would not be an infringement—not the same as Van Brode's material.

Q. You mean not the same as the patent referred to; is that it?

A. That's right. I told him to be careful above all that we would use a different material—which I understand we did; we used a different material from what is used by Van Brode.

The Witness: Does that cover it?

Q. Well, what is the material that you use?

A. The material we use is made by the Bakelite Company. They call it TMD-2155.

In fact, I can go on further. TMD-2155 is a mixture of——

Mr. Halle: We will give you this letter which the attorney of record, Mr. Proujansky, received

(Deposition of Samuel J. Kraver.)

from Bakelite. He wrote for information on the material, and this letter is what he received.

If you want to mark it as an exhibit, or make a copy of it—or I will give you a photostat of it.

Mr. Kirschstein: All right. Let's read it first.

The Witness: I think they even mention there that it's their own material, that they have always used it. [126]

Mr. Kirschstein: We can either read it in, or we can put a copy in.

As I understand it, this is the witness' answer to the question. Let me ask a few questions, and then we will go on with this.

Mr. Halle: All right.

Q. (By Mr. Kirschstein): Have you always used the same plastic since you have been making your battery hold-down frames?

A. I think so. I'm not sure, but I think so. In fact, I can tell you this: I believe that there are other companies that have material similar to that that will serve my purpose. It may not have the same ingredients.

When I decided to make a plastic hold-down, it was not my intention to infringe upon Van Brode. As I mentioned before, I wanted to increase my sales. I was on the out-look for additional items.

So long as the hold-down will serve my purpose, so long as the hold-down will not break, so long as it won't corrode, that serves my purpose.

Bakelite is not the only company that can supply me with a material that will serve my purpose.

(Deposition of Samuel J. Kraver.)

Q. What I want to know is, who chose the material? Did Gary contact Bakelite for material, or what?

A. Gary contacted Bakelite for the material.

Q. The material they wanted had to meet certain specifications, didn't it? A. Yes.

Q. What were those specifications, and who gave them to Gary?

A. I told Gary what I wanted, just in conversation. I'm not a chemist; I didn't mention the formula.

Q. What did you tell Gary?

A. "I want to make a plastic hold-down."

Q. Yes. What did you tell them about the plastic? Even if you are not a chemist, you realized as a layman that you couldn't use any plastic at all, right?

A. I know that metal will corrode. I wanted them to make it in the form of a plastic that would not corrode, that would not break.

Q. How did the particular plastic that is used actually come to be used?

A. I will explain to you. Naturally, Gary does business with various companies, people whom he buys raw materials from. Bakelite evidently is one of them. The Bakelite salesman may have been in at the time, or Gary may have contacted Bakelite.

Q. Let me ask you, did you tell Gary, for example, that you wanted a plastic that would be durable and that would not melt under heat—any

(Deposition of Samuel J. Kraver.)

of that type of specification, for the [128] use that you intended to make of it?

A. I didn't go into fine detail with Gary. I wanted to make—I decided to make a battery hold-down.

Q. Out of plastic? A. Out of plastic.

Q. And it was up to them to get the material to make it with; is that right? A. That's right.

Q. As far as you know, they have used only one material?

A. As far as I know. But I understand Gary—Gary told me, oh, maybe the last month or two, that he might use other plastics as well, because there are other plastics on the market made by other companies that will serve our purpose as well.

Q. But up to now you have always used the same plastic, which is the one supplied by Bakelite.

A. I'm not sure. I think so.

Q. Who would know? Would Gary know?

A. Gary would know."

Mr. Kirschstein: I am now turning to page 21, beginning with line 2.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver, as follows:) [129]

"Q. Have you ever seen the plaintiff's product, the plaintiff's battery hold-down?

A. Have I ever seen it?

Q. Yes. A. Yes.

(Deposition of Samuel J. Kraver.)

Q. When did you first see it?

A. Several years ago.

Q. What is the natural color, if you know, of the plastic, the composition, that is used?

A. I'm not sure. I don't know. I believe you can have that come in various colors.

Q. This plastic could be made in various colors?

A. This plastic could be made in various colors.

Q. How did you come to choose red for your frames?

Q. We use red. We have an item now that we make for spark plugs.

Q. What is that?

A. It's called a dry cap and a dry plug, which we make in red.

Q. What is that?

A. It's geon. Geon is a form of vinyl.

Q. It's a different plastic from this?

A. Yes.

Q. And that's red?

A. That could come in any color we want. We made this [130] in red.

Q. What has that got to do with the color of this?

A. I thought it was somewhat of a kindred item. It's part of the ignition system. It's something that is used around the motor of a car, and customers are partial to red.

Q. How long have you been making that item, the one for the spark plugs?

A. Since 1948 or 1949.

(Deposition of Samuel J. Kraver.)

Q. You have been making that particular thing since 1948 or 1949 in plastic?

A. That's right.

Q. And in red? A. And in red.

Q. What is the color of the ordinary metal battery hold-down?

A. In some cases black, and in some cases a neutral color. No—I think in most cases black. Originally it may have been made, I suppose, of steel, with no color, and I suppose they dip them or paint them black.”

Mr. Kirschstein: I am starting at the last line on page 23.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver, as follows:)

“Q. Was Gary given a sample of what they were to make, [131] a physical sample?

A. What do you mean, “physical sample?”

Q. Were they given a plastic hold-down as an example of what they were to make?

A. Gary was given a Van Brode hold-down by me with the express wishes that the material that would be used would be something other than was used in that particular hold-down—for that reason only.

Q. What were they given the Van Brode hold-down at all for, then?

Mr. Halle: He said “for that reason only.”

A. I'll answer that. To make sure that by

(Deposition of Samuel J. Kraver.)

accident we do not use their formula. They were given that for that express reason.

Q. So they would know what not to make; is that it?

A. I didn't want, by accident, to pick the same type of formula. I wanted to make a hold-down, but I didn't want to use their formula.

Q. You said before that there were a number of plastics that would serve your purposes.

A. No, no—other companies that have them in their regular line, that have plastics that we could use just as well. In fact, we may at some time in the future buy plastics from other companies, not from Bakelite, so that we can have more than one source of supply—for that [132] reason only.”

Mr. Kirschstein: I am now turning to page 27, line 3.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver as follows:)

“Q. When did you first see a copy of the patent in suit?

A. When I first thought I would like to go into making a battery hold-down out of plastic.

Q. When was that?

A. And knowing that there was one on the market made by Van Brode, I instructed Mr. Halle to get me a copy of their patent.

Q. When was that?

Mr. Halle: Maybe I can find it.

A. Sometime in December of 1956.

(Deposition of Samuel J. Kraver.)

Mr. Halle: I have a letter here dated December 10, and I believe the inquiry came to me a little before that.

Q. That is when you first saw the patent, when Mr. Halle got it for you? A. That's right.

Q. But you had seen the product itself several years before? A. Yes." [133]

Mr. Kirschstein: I am now turning to page 32, line 7.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver, as follows:)

"Mr. Kirschstein: Would you mark this as Plaintiff's Exhibit 3 for identification, please."

The Clerk: That is Exhibit No. 4 in this case.

Mr. Kirschstein: Yes, and Exhibit 3 in the deposition.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver, as follows:)

"Q. I show you Plaintiff's Exhibit 3 for identification and ask you to examine and see if you can recognize it. A. Yes.

Q. What is it?

A. I see it's made by Van Brode Milling Company.

Q. It is a Van Brode hold-down?

A. It is a Van Brode hold-down. It's got the name on it, so it must be that."

Mr. Kirschstein: Turning to page 33, the last line.

(Deposition of Samuel J. Kraver.)

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver as follows:)

“Q. Are you familiar with, or have you ever seen, the [134] box that Van Brode sells their frame in? A. By all means.

Q. When did you first see the box?

A. When I first saw their hold-down.

Q. And that was several years ago?

A. That's right.

Mr. Kirschstein: Would you mark this Plaintiff's Exhibit 4 for identification, please.”

Mr. Kirschstein: Your Honor, this is Exhibit 5 in this case, and it was 4 on the deposition.

The Court: All right.

We have a similar copy, haven't we?

Mr. Caughey: Yes.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver, as follows:)

“Q. I show you Plaintiff's Exhibit 4 for identification and ask you if you can identify it.

A. I know the box was red and white. I never examined their box very carefully.

Every item that we make we package, we box. An item can't be sold if it's not boxed. We merchandise everything we make and we box it.

Mr. Kirschstein (To the reporter): Would you read back the answer? I didn't hear his answer.

(Reporter read last answer as recorded.)

Q. You say this is a different box from the one you saw a few years ago, except for the red and white?

(Deposition of Samuel J. Kraver.)

A. I've seen their item on several occasions, and if I remember correctly I think they had several different styles of boxes.

Q. But they always used red and white?

A. If I remember correctly, they used red and white."

* * * * *

"Q. I show you Plaintiff's Exhibit 5 for identification and ask you to identify it. [136]

A. This is a box that I make.

Q. Who designed that box?

A. I designed it myself.

Q. And it is made for you by some manufacturer?

A. When I say that I designed it myself—I'm not a designer. I mean, the people that printed it for me. This box was made by Acme Folding Box. I generally sit down with their salesmen or I go up to see them or they come to see me, and between both of us we designed it.

Q. What is the address of Acme Folding Box?

A. Acme Folding Box—they are at 21 East 25th Street.

Q. New York City?

A. New York City.

Q. Is that the only type of box you use?

The Witness: They are between—I'm not sure of the address—they are between Lexington and Third Avenues, on 25th Street, New York.

Mr. Kirschstein: All right.

(Deposition of Samuel J. Kraver.)

Q. Is this the only type of box you use for these hold-downs? A. We have several sizes.

Q. But outside of the size, is this the only type?

A. The styling?

Q. Yes. [137] A. Practically.

Q. You say "practically." What differences are there?

A. The size of print is different, the size of type. A longer box, a narrower box.

We make boxes to fit the particular hold-down. You can't put a big hold-down in a small box or a small hold-down in a big box.

Q. But the coloring and the style are the same?

A. We try to use the same coloring and the same style—all one box. The particular item, I try to use all the boxes designed one way. The color scheme—we feature yellow and red on all of our packaging." [138]

* * * * *

"Q. Have you ever seen any of the plaintiff's advertising and circulars? A. Yes.

Q. When did you first see that?

A. I saw them on many occasions.

Q. When? How long ago was that?

A. I saw them several years ago, I saw them lately. I have seen them on a number of occasions.

Mr. Kirschstein: Would you mark these as Plaintiff's Exhibits 6, 7, and 8 for identification?"

Mr. Kirschstein: That, your Honor, is Exhibits 7, 8, and 9 at this trial.

(Deposition of Samuel J. Kraver.)

The Court: All right.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver as follows:)

“Q. I show you Plaintiff’s Exhibits 6, 7, and 8 for identification and ask you to examine them and see if you recognize them.

A. I have seen many of these sheets, but whether I can identify individual sheets, maybe yes and maybe no.

When I make an item, as a rule I use my own style and my own designing. We have dozens of catalogue sheets. I don’t generally worry about copying the other fellow. I’ve been in my industry now for thirty-two years. Since 1925 I have been in the automotive business. I have been a manufacturer’s agent; I worked for a jobber, to begin with; I was a manufacturer’s agent after that, and I was in the jobbing and mail-order business after that; and now I’m in manufacturing. Over these years I have had enough experience in seeing thousands of catalogue sheets.

Q. These are examples of the sheets of the plaintiff that you have seen over the last several years?

A. Yes, I believe they are.

Q. Have you produced examples of your advertisements and circulars?

(Mr. Halle handed circulars to Mr. Kirschstein.)

Mr. Kirschstein: Will you mark these, please, as Exhibits 9 and 10 for identification.”

(Deposition of Samuel J. Kraver.)

Mr. Kirschstein: These are 10 and 11 for identification, your Honor, at this trial.

The Court: All right.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver, as follows:)

"Q. I show you Plaintiff's Exhibits 9 and 10 for identification, and ask you if you can identify them.

A. Yes.

Q. Are these your catalogue sheets?

A. Yes.

Q. Who designed these?

A. I generally do it, in cooperation with my printer.

Q. Was the printer given any particular instructions when these were ordered?

A. We generally work together. Do you want me to name the printer?

Q. Yes.

A. I think these were done by Kopp Printing, 226 William [141] Street, New York—Jack Kopp.

Q. Were they given anything to work from?

A. Well, we worked together on them.

Q. Were they given any samples to work from, any samples of anything?

A. Is this a photograph, or is it a drawing? I'm not sure. This might be a photograph or it might be a drawing. He gets a sample. We give him our sample, and either he photographs it from a battery, or he makes a drawing of it. I'm not sure how it was done.

Q. Who gave the printer the text material that is written on there?

(Deposition of Samuel J. Kraver.)

A. We do that together. We decide upon the words to use.

Q. How about things like——

A. Everything. You see, we do that on our own. We decide on that. After all, the thing is supposed to serve a certain purpose; we want to put the proper descriptive material on the catalogue sheet.

Q. In what quantities do you use these circulars?

The Witness: I don't think that's important to this case.

Mr. Kirschstein: Are you refusing to answer?

A. We vary. We may print 5,000 of a sheet, we may print 20,000 of a particular sheet. [142]

Q. Do you have any other types of circulars that you use, or are these the only ones you have used?

A. We have a third one.

Q. Where is the third one?

A. We have it. We came out with that, I would say, about two months ago, six weeks ago.

Q. The third one? A. Yes.

Q. When did you come out with Plaintiff's Exhibits 9 and 10?

A. These two sheets were made originally.

Q. Those are the ones you have used from the beginning of the product?

A. That's right. We came out with a third one.

Mr. Halle: We will get you one.

Mr. Kirschstein: All right.

Q. Do you have any other advertising material?

(Deposition of Samuel J. Kraver.)

A. Yes. We have a display we came out with, a display card.

Q. When did that come out?

A. About a month ago.

In every item that we have we look to improve it all the time. We look for additional advertising literature—anything that would help the item to sell more, to help our salesmen to sell more of it, to help the customers sell more [143] of it. It's the usual practice in our industry.

Q. Did you bring a sample of that?

A. No.

Q. You will produce that also? A. Yes.

Q. Are there any other advertising materials that you have besides what you have just mentioned and what you have produced?

A. I don't think so. We haven't advertised this in any magazines of any kind.

Q. Have you advertised—

A. In any publication.

Q. In any trade publications? A. No.

Q. General publications? A. No.

Q. Newspapers? A. No.

Q. How are these advertisements, Plaintiff's Exhibits 9 and 10, used? Does the salesman take them, or what?

A. The salesmen and the customers. We give them to our salesmen and they distribute them to our customers. We may send it to the customers direct. We enclose this in shipments. We don't do anything with these sheets that we don't do with

(Deposition of Samuel J. Kraver.)

any other catalogue sheets that we produce." [144]

Mr. Kirschstein: Turning to page 65, which occurs in the continuation of the deposition on November 15, 1957.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver, as follows:)

"Q. (By Mr. Kirschstein): Mr. Kraver, you are still under oath. You are the same Samuel Kraver who testified on August 7?

A. I don't know the exact date. I know I testified before.

Mr. Halle: August 7, right.

The Witness: Yes.

Q. And you are the president of Kraver Manufacturing Corp.? A. Yes.

Q. On page 38 of your deposition you mentioned that you would check on whether your corporation made any other items besides the plastic battery hold-down frames that were packaged in just red and yellow, and not in red, yellow and blue. Did you check on that?

A. I brought some empty boxes which will show my type of packages. (Handing to Mr. Kirschstein.)

Mr. Kirschstein: Thank you.

Let the record show the witness handed me several containers.

Will you mark all of these separately. [145]

(Group of boxes furnished by witness as samples of containers used by his corporation

(Deposition of Samuel J. Kraver.)

printed in red, yellow and blue, marked Plaintiff's Exhibits 12 through 17 for identification.)"

Mr. Kirschstein: That, your Honor, is Exhibits 13 through 18 for identification in this trial.

The Court: All right.

Mr. Kirschstein: (Reading):

"(Two boxes also furnished as above, printed in red and yellow, marked Plaintiff's Exhibits 18 and 19 for identification.)"

Mr. Kirschstein: And that is 19 and 20 at this trial.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver, as follows:)

"Q. Mr. Kraver, you have before you Plaintiff's Exhibits 12 through 19 for identification, which are the containers you produced and handed me a moment ago. Would you look at them and identify them? A. Yes.

Q. Do they represent containers for all of your products, or are there other products that you make that you haven't furnished containers for?—with the exception of the plastic battery hold-down frame.

A. I'm not sure. We may have a few others. If you [146] wish every one that I have I'll be glad to send you the balance.

Q. I notice that Exhibits 12 through 17 have a red, yellow and blue color scheme; is that correct? A. Yes.

(Deposition of Samuel J. Kraver.)

Q. Whereas Exhibits 18 and 19 have red and yellow color schemes? A. Yes.

Q. Is there any reason for that?

A. Well, we have people that design boxes for us. We don't always use the same one. Maybe this particular chap thought this would be better for our purposes. It shows out in a different way. No particular reason.

Q. Don't you choose the color scheme for your boxes?

A. We try to. If it's two colors, we try to keep it red and yellow, or red and orange, or blue and orange; and if it's three colors it will be blue and yellow and red, or orange, blue and red.

Most of my items have that color scheme. It could be orange or yellow, and red and blue.

Q. Isn't it correct that blue is in the great majority of your color schemes? A. It might be.

Q. Well, don't you know? A. No. [147]

Q. You don't know whether it is?

A. I know it is. Whether it's a majority, off-hand I don't know. If I examined every one I would be able to tell you.

Q. Well, so far, the containers for the battery hold-down, and these containers exemplified by Exhibits 18 and 19, are the only ones which you have produced which are just red and yellow.

A. It's cheaper to just run two colors. It's more costly to run three colors.

Q. The question is, are there any other con-

(Deposition of Samuel J. Kraver.)

tainers than the one for the hold-down and Exhibits 18 and 19 that use just the two colors?

A. I might have others.

Q. Do you have many others?

A. I can't tell you that.

Q. Don't most of them contain blue?

A. I don't know if most of them do contain blue or not. I've never made a count of it.

Q. When were these containers, Plaintiff's Exhibits 18 and 19, made up for the first time?

A. I would say about three, four or five years ago. Whenever I went into the item.

Q. That particular item?

A. That particular item. [148]

Q. Do you recall about when that was?

A. I'd say either three or four or five years ago. I could call my office and give you within a month or two the correct time, if you wish.

Mr. Kirschstein: Would you mark this Plaintiff's Exhibit 20 for identification, please."

Mr. Kirschstein: This is Exhibit 21 on the trial, your Honor.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver, as follows:)

"Q. I show you Plaintiff's Exhibit 20 for identification (handing to witness). Do you know what that is? A. Yes, sir.

Q. What is it? A. A catalog sheet.

Q. Whose is it? A. Mine.

(Deposition of Samuel J. Kraver.)

Q. It's a catalog sheet put out by your corporation?
A. Yes.

Q. Do your catalog sheets generally include the color scheme you employ on your containers?

A. Not necessarily.

Q. Do any of them?

A. Yes. Several of them, in fact. [149]

Q. Now I notice that none of Plaintiff's Exhibits 9, 10 or 20 have your usual color scheme. How is that?

A. Well, because each catalog sheet serves a particular purpose.

Q. Yes?
A. I answered you.

Q. Well, is there any reason why you didn't use your usual red and yellow, or orange and blue color scheme with these?
A. No reason.

Mr. Kirschstein: Would you mark this Plaintiff's Exhibit 21. * * * And mark this 22."

Mr. Kirschstein: 21 and 22 are Exhibits 22 and 23 respectively at this trial.

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver, as follows:)

"Q. I show you Plaintiff's Exhibit No. 21 for identification and ask you if you know what it is (handing to witness).
A. Yes.

Q. What is it?

A. One of the boxes for a weatherstrip.

Q. Is it put out by you, this box?

A. Yes.

(Deposition of Samuel J. Kraver.)

Q. And the color scheme is one that you developed? [150] A. Yes.

Q. How long has this particular box been in circulation? A. Ten years, approximately.

Q. Now, looking at Plaintiff's Exhibits 12 through 17,—that's this group here—how long have these been in use?

A. Anywhere from three years to ten years.

Q. I show you Plaintiff's Exhibit 22 for identification and ask you if you know what it is (handing to witness). A. Yes, I see it. Yes.

Q. What is that?

A. A display for our shockproof flashlights. Five years, approximately.

Q. It's been out about five years, this display?

A. Yes.

Q. Did you develop the color scheme for it, like the other exhibits? A. Yes.

Q. I show you Plaintiff's Exhibit 23 for identification and ask you if you know what that is (handing to witness).

A. A display for battery hold-downs. It's been out about three months, four months, five months, approximately."

Mr. Kirschstein: That is Exhibit 24 at the trial.

(Whereupon counsel resumed the reading of the [151] deposition of Samuel Kraver as follows:)

"Q. Do your customers use these display cards in the sale of the products you send them?

(Deposition of Samuel J. Kraver.)

A. It could be.

Q. In other words, are these used by you to sell your products to your customers, or are they sent to those customers to sell the product to the ultimate retailer or the public?

Mr. Kirschstein: Do you follow my question?

The Witness: No.

Q. I'm asking you, what are these display cards primarily for? Are they for you to sell your product to some one?

A. It's to help to sell the product.

Q. It's to help your customer to sell it; isn't that true?

A. To help to sell the product. I assume, of course—I ship these to my customers.

Q. The display cards, you mean?

A. Yes—my distributors, my jobbers.

Q. What are they supposed to do with them?

A. Distribute them where they sell hold-downs.

Q. You don't use them in order to induce your distributors to take your products, do you?

A. I try to sell my products. If display matter will [152] help me to sell my products, I will have display matter made up.

Q. But they don't constitute advertising to your distributors; they are to be used by your distributors, is that correct?

A. I hope so.

Q. Is it customary for your battery hold-downs to be sold in the containers in which they are shipped?

A. I think so.

(Deposition of Samuel J. Kraver.)

Q. Do any of your customers put them in their own boxes? A. Might be.

Q. Well, do you know whether they do or not?

A. I haven't seen any, but I assume that we have some customers that do sell them in their own cartons.

Q. Would you say that the great majority of your customers sell your plastic battery hold-downs in the containers you supply? A. Yes." [153]

* * * * *

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver as follows:)

"Q. The plastic that you use is the one that is described in Plaintiff's Exhibit 2?

A. I think that's the plastic that we use.

Q. All right. Now, am I correct in saying that neither you nor Gary did any chemical development on the plastic itself?

A. I think you are correct. This was developed all the way through by Bakelite.

Q. And you buy the product from Bakelite?

A. I don't think we do anything to it. I'm pretty sure we use the material exactly as is.

Q. Then you don't have any specifications?

A. I'll repeat: I think that we use this material exactly as is.

Q. Do you have any chemical data, development data, on this plastic?

A. Whatever data is on this piece of paper, I think. We asked Bakelite for that.

Q. That's all you have? A. That's right.

(Deposition of Samuel J. Kraver.)

Q. Was this plastic specially developed for Gary and you, or was it one they just sell?

A. As I understand it, it was never developed for us. [169] It's something which they have on the market and have made for several years.

Q. How do you know that they have been making it for several years? I mean, is that a guess, or do you know?

A. I don't think it's a guess. I think Gary was informed as much.

Q. This is what Gary told you had been told them?

The Witness: (To Mr. Halle) Doesn't Bakelite mention it there?

A. No, it's not mentioned. As I understand, Gary informed me—I don't know Bakelite at all—Gary informed me that this was a regular powder that Bakelite sells to various other people."

Mr. Halle: I now turn to page 23. Starting at the top of the page. This is with reference to color. The previous questions were with reference to the color of the steel frames, and the witness answered that he thought steel frames were in most cases black. The next question:

(Whereupon counsel resumed the reading of the deposition of Samuel Kraver as follows:)

"Q. Wouldn't that be the color the public is used to, then?

A. I prefer black, I prefer red. We have used red in the past, and so long as this is an item

(Deposition of Samuel J. Kraver.)

that will cost more [170] than a metal one, it's better to make it a different color. It's just better-looking, a better appearance.

Q. How about green or blue or yellow?

A. I've used red before.

Q. You mean on these spark plug items?

A. That's right. Another thing: Wire today, red wire, has become very popular. For years wire was always made in black. The last few years red has become popular. There is red wire that is made by Crescent Cable, Walker Cable, and other companies. Whereas years ago, wire was primarily made in black and made of rubber, the last few years plastic has become popular in wire. When plastic becomes popular, at one time it was black and then the last few years it has swung over to red.

So long as manufacturers were making plastic wire out of red, this was another reason for me to make the hold-down out of red." [171]

* * * * *

"Q. I show you Plaintiff's Exhibits 24 and 25 for identification and ask you if you can identify them.

A. They are catalog sheets which my company has put out.

Q. I note that Exhibit 25 relates to an item called 'Drycaps'. A. Yes.

Q. I believe you testified that you produced those in red also? A. Yes.

Q. Could you produce a red one?

(Deposition of Samuel J. Kraver.)

A. Yes. [175]

Q. Will you produce a red one?

A. Yes. (Witness hands Drycap to Mr. Kirschenstein.)" [176]

* * * * *

"Q. I show you Plaintiff's Exhibit 26 for identification and ask you if you can recognize it (handing to witness). A. Yes.

Q. What is it? A. A red 'Drycap'.

Q. Is this made by you now? A. Yes.

Q. I mean at the present. A. Yes.

Q. When did you start making the red one?

A. At the same time as I made black ones.

Q. Would you tell me when that was?

A. About two years ago, approximately.

Q. What percentage of the 'Drycaps' are red as opposed to black?

A. The majority are red."

Mr. Halle: That is all I have to read, your Honor.

At this time, your Honor, I offer the two exhibits, 25 and 26 for identification, in evidence.

The Court: They may be received.

The Clerk: Plaintiff's Exhibits 25 and 26 in evidence.

(The exhibits heretofore marked Plaintiff's Exhibits 25 and 26 were received in evidence.)

Mr. Halle: At this time I would also like to offer in evidence Defendant's Exhibit C for identification, which is a tear sheet that I showed the

first witness on the stand showing a steel frame with rubberized coating. I believe there will be no objection to that.

The Court: All right. It may be received. [178]

* * * * *

Mr. Kirschstein: Starting on page 2:

(Whereupon counsel commenced the reading of the deposition of Rudolph Fritzhand as follows:)

RUDOLPH FRITZHAND

“Q. (By Mr. Kirschstein): Would you state your name, age and address, please?

A. Rudolph B. Fritzhand; home address, 75 Emerson Drive, Great Neck, New York; I am forty-one years old.

Q. Are you acquainted with defendant Gary Enterprises, Inc. in this case? [179]

A. Yes.

Q. Have you any connection with that company?

A. Yes.

Mr. Kirschstein: From now on, I will refer to that corporation as “Gary” for the sake of brevity.

Q. What is your connection with Gary?

A. I am president of the corporation.

Q. Is that a stock corporation? A. Yes.

Q. Are you the principal stockholder?

A. Yes.

Q. Are there other stockholders? A. Yes.

Q. Who are they?

A. Max Fritzhand and William Fritzhand.

Q. And you are the majority stockholder?

A. Yes.

(Deposition of Rudolph Fritzhand.)

Q. Are you a director? A. Yes.

Q. Would it be correct to say that you run Gary's business? A. Yes.

Q. What is the business of Gary?

A. We are custom injection-molders.

Q. Could you explain that a little better. [180]

A. We are contract injection-molders. We make plastic parts for the different manufacturers under contract.

Q. Do you use the parts after you have made them? A. No, we don't.

Q. Then if I understood you correctly, you make parts used in injection-molding; is that correct?

A. No, we injection-mold the parts.

Q. Oh, I see. You produce parts for manufacturers by injection-molding?

A. By injection-molding; that is correct.

Q. What do you use to produce these parts. Do you use dies and molds? A. That is right.

Q. Where do they come from?

A. Some we make; some we have bought on the outside.

Q. Are you familiar with the subject matter of this suit? A. Yes.

Q. You are familiar with the other defendant, Kravex Manufacturing Corp.? A. Yes.

Q. Do you make plastic battery hold-down frames? A. Yes.

Q. Whom do you make them for?

A. Kravex Manufacturing. [181]

Q. Do you make them for anyone else?

(Deposition of Rudolph Fritzhand.)

A. No.

Q. You make plastic battery hold-down frames for one corporation, to wit, Kravex?

A. That is right.

Q. Have you brought with you any samples of the plastic battery hold-downs you make?

A. No.

Q. Do you make any other type of battery hold-down than a plastic one? A. No.

Q. Have you ever made any other type?

A. No.

Q. The one that you are talking about that you make for Kravex is the only battery hold-down you have ever made? A. That is right.

Q. And are making now?

A. That is right.

Q. I show you Plaintiff's Exhibit No. 1 for identification, and ask you if you can recognize that.

A. Yes."

Mr. Kirschstein: Your Honor, that is Exhibit 3 in evidence in this case, an example of one of the frames sold [182] by the defendant.

Mr. Caughey: I think the judge has seen that before.

The Court: Which is that?

The Clerk: I will get it for you. It is Exhibit 3 in evidence.

Mr. Caughey: That is one made by Gary.

The Court: All right.

Is this one of the accused devices?

(Deposition of Rudolph Fritzhand.)

Mr. Kirschstein: Yes, your Honor.

(Whereupon counsel resumed the reading of the deposition of Rudolph Fritzhand as follows:)

“Q. What is it?

A. It is a battery hold-down.

Q. Do you know who made it?

A. It is similar to the one that I make.

Q. Is there any way that you can identify it as the one that you make?

A. I think it is the one I make. I don't believe anybody else is making it. There is no way that I can really identify it.

Mr. Kirschstein: Off the record.

(Discussion off the record.)

Q. I show you Plaintiff's Exhibit No. 3 for identification, and ask you if you know what that is.

A. It is a battery hold-down.”

The Clerk: That is our Exhibit No. 4 in evidence.

(Whereupon counsel resumed the reading of the deposition of Rudolph Fritzhand as follows:)

“Q. Could that be one made by you?

A. No.

Q. How can you tell?

A. Well, I can tell by the contour of the piece itself. On all ours we have a round part on top here (indicating).

(Deposition of Rudolph Fritzhand.)

Q. And Plaintiff's Exhibit No. 3 doesn't have it?

A. No.

Q. Is that the only way you can tell?

A. Well, I know I didn't make any with Van Brode's name on it.

Mr. Kirschstein: I see. Off the record.

(Discussion off the record.)

Q. Do you make different types of these plastic battery hold-downs?

A. I would say they are all the same type, but different sizes.

Q. They are the same in all respects but size?

A. That is right, size, and the location of the holes.

Q. And by "holes," you refer to these things at the [184] side of Plaintiff's Exhibit 1?

A. That is right.

Q. What are those holes for?

A. To clamp the battery hold-downs on top of the battery.

Q. How long have you been making plastic battery hold-downs for Kravex?

A. About four months.

Q. How did you get into the manufacture of them?

A. Kravex came to me and asked me to make them.

Q. Do you use molds or dies? A. Yes.

Q. Which? Do you use both?

A. We use molds.

Q. The technical word is "molds"?

(Deposition of Rudolph Fritzhand.)

A. That is right.

Q. Did you have to make the molds for these hold-downs? A. Yes.

Q. How is that done? How are the molds made?

A. By steel, you make the molds, cut them out.

Q. How did you know what shape to make the molds, what size, and so on?

A. Mr. Kraver brought us the different sizes he wanted made. [185]

Q. What exactly did he bring?

A. The metal frames.

Q. He brought you the sizes as exemplified by metal frames? A. Yes.

Q. Did he bring you any plastic frame?

A. Not to make the sizes. He brought me a plastic frame to show me the type of material he didn't want to use.

Q. Did he bring you a plastic frame?

A. Yes.

Q. And whose was that?

A. I believe it was Van Brode's.

Q. Who actually handed you the plastic frame?

A. Mr. Kraver.

Q. Mr. Samuel J. Kraver?

A. Sam Kraver—I don't know his middle initial.

Q. The president of Kravex Manufacturing Corp.? A. I believe so.

Mr. Kirschstein: Off the record.

(Discussion off the record.)

Q. What instructions or comments did Mr.

(Deposition of Rudolph Fritzhand.)

Kraver make to you at the time he gave you the plastic frame?

A. He had mentioned to me that there was a patent on the material that this hold-down was being made of, and he didn't want to use the same material. [186]

Q. I see. So what did he tell you to do?

A. He wanted me to find a material that would be non-corrosive and stand up under the heat of the battery.

Q. Did you have anything to do with the development of the material you were to use for your frames? A. No.

Q. How did you get hold of the material?

A. I contacted different manufacturers.

Q. And what were the requisites of the material? I mean, what characteristics, physical characteristics, did it have to have to satisfy you?

A. Non-corrosive, and the highest melt index.

Q. What is the highest melt index?

A. On this, here, I believe it was about 174 degrees, 177 degrees, I don't recall.

Q. Fahrenheit or Centigrade?

A. Fahrenheit.

Q. You mean it shouldn't melt below that?

A. Yes.

Q. How about its tensile strength, and so on?

A. That was considered also. We selected the material with the highest tensile strength.

Q. So that it would hold its shape?

A. Yes.

(Deposition of Rudolph Fritzhand.)

Q. How about its ability to insulate? It would have [187] to be an insulating plastic, wouldn't it?

A. I don't recall.

Q. What about breakability?

A. Well, that would be the tensile strength.

Q. These physical characteristics—were they explained to you by Mr. Kraver, that that was what he wanted the frame to have as far as its physical characteristics were concerned?

A. He didn't give me any definite physical characteristics. He just wanted a material that would stand up under the heat and be practically unbreakable, and keep its shape. He was mostly concerned with the high heat index and the unbreakability.

Q. Are you fairly familiar with the chemical composition and characteristics of plastics?

A. No.

Q. What is the extent of your knowledge in that field? You know something about plastics, don't you?

A. Yes.

Q. How long have you been working with plastics?

A. Twelve years.

Q. Are you familiar with the different types of plastics made?

A. Yes.

Q. And are you familiar with their different physical [188] properties?

A. To a certain extent.

Q. Well, then you explained to these various manufacturers you were contacting what type of plastic you wanted; is that correct?

(Deposition of Rudolph Fritzhand.)

A. I told them what I wanted the material for, and they came out with the material.

Q. Where do you get your material from?

A. Bakelite.

Q. Is that the only place?

A. No — Dow Chemical, Monsanto, Tennessee Eastman, Celanese.

Q. I am talking about the battery hold-down. Do you get it from all of these concerns?

A. No; I only get it from Bakelite.

Q. Bakelite is the only supplier of the material for the battery hold-down?

A. That is right.

Q. What is the material that comes from Bakelite? A. I believe it is TMD-2155.

Mr. Kirschstein: Off the record.

(Discussion off the record.)

Q. Do you know offhand the chemical composition of TMD-2155? A. No. [189]

Q. I will show you Plaintiff's Exhibit 2 for identification and ask you if you have ever seen that letter before (handing document to witness)."

The Clerk: That is Defendant's Exhibit I here.

(Whereupon counsel resumed the reading of the deposition of Rudolph Fritzhand as follows:)

"A. Yes, I believe I got a copy of this here.

Q. Let me ask you this. Does your knowledge of the composition of the plastic you use for the bat-

(Deposition of Rudolph Fritzhand.)

tery hold-downs exceed what is written in that letter? A. No.

Q. You couldn't tell me anything more than that? A. No.

Q. Do you have any records or drawings or development reports on the material that you use?

A. Only the things that are published by Bakelite.

Q. You just have Bakelite's material?

A. That is right, just their publications.

Q. You had nothing to do with the development of the plastic? A. Nothing whatsoever.

Mr. Halle: Off the record.

(Discussion off the record.)

Q. Is the plastic that you use for these hold-downs [190] the only one you could use?

A. No, I believe we could use another one. I believe Dow Chemical has one that is similar to this here. I don't know what the physical contents are, but I believe it is similar.

Q. Are there other plastics which you could use which have the physical characteristics you want?

A. I believe so, I believe Dow Chemical has one.

Q. Does Bakelite have any others?

A. I don't know.

Q. Did you select anything from Bakelite, or did they just send you something in response to your definition of what you wanted?

A. Well, we discussed the material and they suggested that this would be the best for it.

Q. Who discussed the material?

(Deposition of Rudolph Fritzhand.)

A. One of the employees of Bakelite.

Q. With whom? A. With me.

Q. Who was the employee of Bakelite?

A. I think it was Mr. Sherman.

Q. Mr. Sherman. Is he at their New York office?

A. Yes.

Q. You discussed what you wanted the material for, and he suggested the one you are using?

A. Yes. [191]

Q. Is that the only one you have ever used?

A. Yes.

Q. You have always used the same plastic from the beginning for these battery hold-downs?

A. That is right.

Q. How does that plastic come to you?

A. In drums.

Q. In what form? A. In pellets.

Q. What color are the pellets?

A. Red. It comes in all colors.

Q. The plastic comes in all colors?

A. Yes. You can select any color you wish.

Q. How is it you selected red?

A. I didn't select it.

Q. Who selected it?

A. Kravex Manufacturing.

Q. They told you they wanted red?

A. That is right.

Q. Who told you that? A. Mr. Kraver.

Q. Did you ever analyze the sample plastic battery hold-down given you by Mr. Kraver?

A. No.

(Deposition of Rudolph Fritzhand.)

Q. To see what it was made of? [192]

A. No.

Q. Did you ever give it to Bakelite to analyze?

A. No.

Q. Did you ever give it to anyone to analyze?

A. No.

Q. Do you know what it is made of?

A. No.

Q. How did it help you avoid infringing the patent? A. What?

Q. The plastic hold-down you were given.

A. Well, we had a copy of the patent.

Q. You explained before that you were given a sample by Mr. Kraver of plaintiff's plastic battery hold-down to make sure you wouldn't make one out of the same composition theirs was made of.

A. Yes.

Q. I am saying, how did that sample help you avoid that?

A. The sample didn't help me at all. The patent helped me.

Q. He gave you a copy of the patent?

A. Yes.

Q. The sample did not serve the purpose you mentioned of preventing you from making one of the same plastic; is [193] that correct?

A. From using the same material.

Q. It did not help you do that?

A. No, but the patent did, the patent number. We got the patent, and we told Bakelite what the patent was.

(Deposition of Rudolph Fritzhand.)

Q. When did you get the patent?

A. I don't know exactly when. I really don't.

Q. Did you get it before you got the plastic sample, or after?

A. I really don't recollect.

Q. Was it around that time?

A. About that time, yes.

Q. Did you send the patent to Bakelite?

A. No, but I discussed it with their man.

Q. Did you ever give Bakelite the patent number? A. I believe I did.

Q. Do you know whether they ordered a copy of the patent? A. I don't know.

Q. But you discussed the patent? A. Yes.

Q. Did you read the patent? A. Yes.

Q. You understand patents?

A. To a certain extent. A layman's understanding. [194]

Q. Do you understand sufficiently to know what plastic is referred to in it? A. Yes.

Q. Does the plastic you use, or that you want to use, for plastic battery hold-downs have to be a polystyrene plastic? A. Not necessarily.

Q. Does it have to be a butadiene plastic?

A. Not necessarily.

Q. Does it have to be a combination of butadiene and polystyrene co-polymers?

A. I don't know whether it necessarily has to be or not.

Q. Are there entirely different plastics which

(Deposition of Rudolph Fritzhand.)

could serve your purposes, that would have the appropriate characteristics?

A. I imagine there are.

Q. Well, you say you imagine: do you know or don't you?

A. I don't know definitely.

Q. You have had experience in this field for twelve years. On the basis of that experience——

A. I have never used anything for that purpose before, so I don't know. But I believe there are other materials that could be used. [195]

Q. What type of plastics have you worked with up to now?

A. Butyrate, acetate, styrene.

Q. Didn't you have to make any plastics——

A. (Interposing) Not for battery hold-downs.

Q. Didn't you have to make any that had non-corrosive attributes? A. No.

Q. What have you made before?

A. We made various items.

Q. What?

The Witness: Do I have to answer that?"

Mr. Kirschstein: The witness was directed not to answer these questions.

The Court: He is not here so if he didn't answer them——

Mr. Kirschstein: I am going now to page 20, line 15.

(Whereupon counsel resumed the reading of

(Deposition of Rudolph Fritzhand.)

the deposition of Rudolph Fritzhand, as follows:)

“Q. Have any of the other items you have made before the plastic hold-down been required to have noncorrosive attributes? A. No.

Q. Do they have to have high tensile strength, any of [196] them, as high a tensile strength as the hold-down? A. No.

Q. They are all entirely different plastic articles? A. I would say yes.

Q. Did you ever make any plastic articles for the automotive field? A. Yes.

Q. What? A. We have made “Drycaps.”

Q. What is a “Drycap”?

A. That’s made out of vinyl.

Q. But what is it?

A. It’s something that fits over a spark plug.

Q. It goes over a spark plug? Doesn’t that have to be noncorrosive?

A. Well, it’s a completely different material. It’s a vinyl material.

Q. How did you know that the plastic you were getting from Bakelite — if you knew — did not infringe the patent?

A. Only what they told me. Only what Bakelite told me.

Q. They told you it didn’t infringe?

A. That is right.

Q. Who at Bakelite told you that?

A. Mr. Sherman.

(Deposition of Rudolph Fritzhand.)

Q. Do you know his position there, by any chance? [197]

A. I think he is a technical adviser.

Q. Do you know his first name? A. No.

Q. Could you find out his first name? Do you have any correspondence which would show his first name?

A. I believe we have, or else I could call him and find out.

Mr. Kirschstein: I would like the witness to ascertain the first name of Mr. Sherman of Bakelite."

The Court: I think he signed that letter.

Mr. Kirschstein: That was Dr. Whittaker who signed that letter.

(Whereupon counsel resumed the reading of the deposition of Rudolph Fritzhand as follows:)

"Q. When you get the material from Bakelite that you use for these plastic battery hold-downs, do you modify it in any way? Do you add anything to it? A. No.

Q. What do you do with it?

A. What we do with it?

Q. Yes.

A. We put it on machines and we mold it.

Q. How is that done? Is it heated, or what?

A. It is the heat of the machine. [198]

Q. In other words, you just take what you get from them and use it? A. That is right.

(Deposition of Rudolph Fritzhand.)

Q. Were there any manufacturing problems that you encountered in making these plastic battery hold-downs?

A. I don't understand what you mean.

Q. You were given, I believe, metal hold-downs.

A. Yes.

Q. And you were to make a plastic one like that; is that right? A. That is right.

Q. Were there any problems in developing the molds for that? A. No.

Q. Aren't the plastic hold-downs of different shape from the metal hold-downs?

A. Very little variation.

Q. Well, is there any variation?

A. There may be a slight variation, because Mr. Kraver wanted to incorporate different sizes.

Q. How did you design the mold, then?

A. How the mold was designed? We would take two or three of the same size and try to find the locations — where we had similar locations for the pins, for the holes, and consolidate them. [199]

Q. Was the plastic sample you were given used in designing the molds? A. No.

Q. That was not used at all in designing the molds? A. No.

Q. In no respect whatsoever?

A. None that I know of.

Q. Then according to your testimony, the plastic sample you were given served no purpose whatsoever, did it?

(Deposition of Rudolph Fritzhand.)

A. Except for the patent number that it had on it.

Q. He gave you the plastic hold-down sample so you could tell the patent number from it?

A. That is right.

Q. He hadn't told you the patent number, before he gave you the sample, on the telephone, or anything?

A. No, not that I recall. I don't know, I don't remember.

Q. Now, taking Plaintiff's Exhibits 1 and 3 for identification, would you show me any differences in construction, if any, that you can find?

(Witness examined two exhibits.)"

The Clerk: 1 and 3 are Plaintiff's Exhibits 3 and 4. [200]

(Whereupon counsel resumed the reading of the deposition of Rudolph Fritzhand as follows:)

"A. The thickness is different.

Q. Of the side walls, you are speaking of?

A. All the walls, I believe, are heavier.

Q. Are all of the plastic hold-downs that you make of the same wall thickness?

A. I would say most of them are.

Q. Are they all?

A. I don't recall offhand.

Q. You don't know?

A. I don't know offhand. I would say they are

(Deposition of Rudolph Fritzhand.)

uniform. I think we try to keep them as uniform as we can."

Mr. Kirschstein: I am skipping to the last question on the page now.

(Whereupon counsel resumed the reading of the deposition of Rudolph Fritzhand as follows:)

"Q. Are you still making these frames?

A. As we get orders.

Q. As you get orders? A. Yes.

Q. Well, don't you get orders for all the different sizes at one time? A. No." [201]

Mr. Kirschstein: I am skipping the colloquy to the next question.

(Whereupon counsel resumed the reading of the deposition of Rudolph Fritzhand as follows:)

"Q. You say you met with no designing or manufacturing problems; is that correct?

A. Well, the normal amount that you run into in any job.

Mr. Halle: Off the record.

(Discussion off the record.)

Q. Outside of the wall thicknesses, do you find any other difference between Exhibits 1 and 3 for identification? A. Well, a different size.

Q. Anything else?

(Deposition of Rudolph Fritzhand.)

A. I don't believe so.

Q. Are the plaintiff's hold-downs constructed the same as the metal ones?

A. As far as size is concerned?

Q. No, I mean as far as construction is concerned.

A. I don't understand.

Q. Do you know how the metal battery hold-downs are made?

A. How they are made?

Q. Yes.

A. I don't know how they are made. [202]

Q. Do you know what they look like?

A. I know what they look like.

Q. Do they look to be of the same construction as the plastic ones?

A. It is similar, but they are much thinner. The shape is the same.

Q. How about the side parts with the holes in them on Plaintiff's Exhibit 1 — does the metal one have parts like that?

A. I don't know what you mean.

Q. The protuberances I am pointing to here (indicating).

A. I believe some of them do, some of them don't. You don't need as much material in the metal as you do in plastic.

Q. Now you say the composition that you use for the plastic hold-downs has never been changed?

A. No."

Mr. Kirschstein: Your Honor, I don't want to read this part, but we asked this party to produce

(Deposition of Rudolph Fritzhand.)

his manufacturing drawings, and he refused to produce them, and a motion was made to compel him to produce them and the motion was denied with respect to that.

I say that so I don't have to read the pages.

The Court: All right. Just state for the record [203] why those were not read. All right.

Mr. Kirschstein: Page 43, which is in the continuation of this witness' deposition on November 15th, 1957.

(Whereupon counsel resumed the reading of the deposition of Rudolph Fritzhand as follows:)

"Q. Mr. Fritzhand, you are still under oath. Are you the same Rudolph Fritzhand who appeared on August 30 for defendant Gary Enterprises, Inc.?"

A. Yes.

Q. Have you produced the plastic battery hold-down frame which you mentioned in your deposition was given by Mr. Kraver to you as a sample of plaintiff's manufacture? A. Yes.

Mr. Kirschstein: Will you mark this Plaintiff's Exhibit 30 for identification.

The Clerk: 30 is now marked as our Exhibit 29.

The Court: It may be received.

The Clerk: It is in evidence.

(Whereupon counsel resumed the reading of the deposition of Rudolph Fritzhand as follows:)

(Deposition of Rudolph Fritzhand.)

“Q. Now I show you Plaintiff’s Exhibit 30 and ask you to identify it (handing to witness).

A. Yes, sir.

Q. This is the frame you were referring to on pages 8 [204] and 9 of your deposition as being the example of plaintiff’s manufacture that was furnished to you? A. Yes.

Q. And this is the one you were talking about subsequently? A. Yes.”

* * * * *

“Q. Who designed the molds for the plastic battery hold-down frame that you made—and by “you” I mean Gary.

A. I don’t know what you mean.

Q. Who made them?

A. Who made the molds?

Q. Yes.

A. We did—Gary Enterprises.

Q. When you make a mold isn’t there a drawing laid out, or something to make it from?

A. Yes.

Q. Who laid out the drawing?

A. My engineer.

Q. Who was he? [205]

A. Mr. Marcus.” [206]

* * * * *

Mr. Kirschstein: Your Honor, in lieu of reading a deposition, we have on oral stipulation.

The Court: All right.

Mr. Kirschstein: It is stipulated between the parties hereto that defendant Cox has sold and sells

the Kravex frame, the accused frame herein subsequent to the issue date of the suit patent, that notice was given to this defendant of plaintiff's contentions herein by letter dated May 24, 1957, which was received several days after its date.

Mr. Halle: It is so stipulated, your Honor.

The Court: What is the relationship of Cox to the plaintiff?

Mr. Kirschstein: It is a customer, your Honor.

The Court: Just a distributor?

Mr. Kirschstein: Yes.

The Court: All right.

Mr. Kirschstein: I offer Plaintiff's Exhibit 53 for identification in evidence.

The Clerk: This is offered in evidence, your Honor.

Mr. Halle: Your Honor, Cox is not a distributor of Kravex; it is merely a customer of Kravex. They buy frames from Kravex and resell them.

The Court: All right. [207]

* * * * *

ISADOR MILLER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: Isador Miller. I-s-a-d-o-r M-i-l-l-e-r.

Direct Examination

Q. (By Mr. Kirschstein): Will you state your address, Mr. Miller?

(Testimony of Isador Miller.)

A. I live at 211 West 106th Street, New York City.

Q. Your age? A. 67.

Q. What is your present occupation?

A. I am a consulting chemist.

Q. Are you with any particular laboratory, or do you have one?

A. I am with the W. M. Grosvenor Laboratories in New York City.

Q. Will you state your educational background?

A. I graduated from the College of the City of New York in 1910 with a degree of Bachelor of Science, and after that I took post-graduate work in chemical subjects at Columbia University from time to time, but never for the purposes of getting a higher degree.

Q. Was the Bachelor of Science in chemistry?

A. At the time that I went to C.C.N.Y., the degree was not issued in that way, but I specialized in chemical work in all my electives.

Q. Would you trace your occupation since graduation?

A. When I graduated college I went to work for the U. S. Army Powder Works at Picatinny Arsenal, New Jersey. I stayed there for approximately two years and left as the result of an explosion, injury to myself, and when I went back into work, by that time the first World War had started. I went to work for the Aetna Explosives Company at their picric acid plant in Emporium, Pennsylvania.

At the arsenal my work started in as a laboratory

(Testimony of Isador Miller.)

assistant, but before I had left I had arrived at the classification of a chemist who specialized particularly in the work on the development of high explosives, which were organic, nitration compounds. At Aetna I was chief chemist at the picric acid plant in charge of all the work for the manufacture of picric acid, as well as for the work on the manufacture of nitric acid and the concentration of sulfuric acid for our affiliated [213] plant, which was down the line, which was one of the Aetna plants for making smokeless powder.

The Aetna Explosives Company later was absorbed by Hercules Powder Company.

After I left Aetna for about two years I was in various phases of the manufacture of dyestuffs, organic dyestuffs, that is. This was a new industry at that time. As well as work on manufacture of acid.

And then in 1916 I went to work for Dr. Grosvenor, who was the founder of the W. M. Grosvenor Laboratories. I stayed with him until 1920. My work there was in laboratory work in preparing with him or for him his work in connection with patent cases, as well as process and product improvement and development.

After 1920 for a period of about 12 years I was in business for myself as a consulting chemist in lines of paints, lacquers, acids, organic chemicals.

In 1932 I went back into the employ of Dr. Grosvenor and have remained with the organization ever since.

When I first went back there I was put in charge

(Testimony of Isador Miller.)

of all the laboratory work on the staff, and our work was primarily at that time along the same lines as the work that I had done with him and for him previously.

Beginning about 20 years ago our laboratory started to specialize more in the application of plastics, utilization [214] of plastics, the manufacture of materials associated with plastics, and until 1944 when Dr. Grosvenor died I was an employee of the laboratory.

At his death his son and I continued the business as partners, and we remained partners until 1950 when I bought out his son's and the family's interest in the laboratories, and I have remained as sole owner since then.

My work, as I said before, in the last 20 years, has been primarily in the plastic and lacquer and paint and varnish fields. I have designed, installed, and operated plants in the plastic field.

Among the patents that have been issued to me are two patents in the plastic field, and as late as last year I engineered — designed and engineered and installed a plant for the manufacture of plasticizers, which has a capacity and is now operating very nicely — has a capacity of approximately 10 million pounds per year.

Q. Did you do any work in connection with a Banbury mixer?

A. I pioneered in the use of a Banbury mixer in the plastic industry, and one of the patents issued to me, which I say was in the plastics field, was a pat-

(Testimony of Isador Miller.)

ent for the use of the Banbury in making certain types of molding powders.

Q. Did you have any position with the government in World War I years? [215]

A. Not during World War I. During World War II I was a member of the Industry Committee for the Cellulose Acetate Molding Powder Industry in Washington.

The Court: We had some Bramberry patents involved in the Everlube case. Do you remember which patent?

The Witness: I have a copy of my patent, your Honor. Unfortunately, when I left New York I did not have a soft copy.

The Court: I can tell from the opinion which one was involved there. That was a paint spray.

The Witness: I don't believe my patent was involved in that case, unless it was cited, but this is a copy of my patent, U. S. 2,351,866.

The Court: Is that Bramberry?

The Witness: No. Banbury, B-a-n-b-u-r-y.

The Court: I merely wanted to know if it was a patent with which I am familiar.

We had a Bramberry patent 2,534,406, which involved a paint spray.

The Witness: Your Honor, I should like to ask if in accordance with my testimony I come across names, may I stop to spell them out?

The Court: Yes. The reporter appreciates that. Go ahead.

(Testimony of Isador Miller.)

Q. (By Mr. Kirschstein): Have you testified in patent [216] cases before? A. I have.

Q. Are you a member of any societies?

A. The American Chemical Society, the Chemists Club, and the American Institute of Chemists.

Q. Are you familiar with the suit patent?

A. I am.

Q. Are you familiar with the product known as polystyrene? A. I am.

Q. And its uses and physical characteristics?

A. I am.

Q. Would you describe those, please?

A. Polystyrene is a synthetic resin which is hard, glassy; its chief characteristic from the standpoint of use is the fact that it is thermoplastic, which means that it can be changed in form under heat and pressure, and in its uses it always remains a thermoplastic material.

Q. Have you noted in the patent the patentee's pointing out of disadvantages of plain polystyrene for the purposes of his article? A. I have.

Q. Do you agree with his statement of the disadvantages of ordinary polystyrene?

A. I do. [217]

Q. Could you illustrate these disadvantages?

A. I requested counsel to have some hold-down frames made from polystyrene, and I also brought with me one or two gadgets that I made from polystyrene, which I think will illustrate it to the court, if I may be permitted to do so.

The Court: All right.

(Testimony of Isador Miller.)

The Witness: I have here a dish which I took out of my own kitchen which we use for butter, and you will notice if I press it together it crushes and breaks. This dish is made of polystyrene.

The Court: Now, wait a minute. Before you go on, let's identify this as something.

The Clerk: That will be Plaintiff's Exhibit No. 64, your Honor, what is left of it.

The Court: The gentleman still has a good grip.

The Witness: In spite of my age.

Mr. Caughey: Judge, he has virility.

The Witness: I also, as I say, at my request—I asked counsel to have some hold-down frames made for me from polystyrene, and I have such a frame in my hand.

The Court: We will give that a number.

What do you want to tell us about it? It has that triangle in the corners.

The Witness: It is a little larger than Exhibit 29. [218]

The Clerk: This will be Plaintiff's Exhibit No. 65, your Honor.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 65 for identification.)

The Witness: It is a polystyrene hold-down frame.

The Court: Go ahead.

The Witness: I have another one here. One can be kept as the exhibit and one can be kept for my purposes. I wish to break this.

The Court: All right. Go ahead and tell us.

(Testimony of Isador Miller.)

The Clerk: 66 will be the broken one.

The Court: All I want is to identify it. Proceed with the examination.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 66 for identification.)

The Witness: I broke it by dropping it on the floor, and it is now broken into three parts.

The Court: You broke it by bending it?

The Witness: Yes. It breaks with a clean fracture, your Honor, without any bend to it.

Incidentally, the piece shows the physical characteristics of polystyrene as a clear transparent resin, which is used as a cheap substitute for glass for certain purposes.

Q. (By Mr. Kirschstein): Mr. Miller, will you state [219] the general categories of plastics that were available in 1950 and 1951?

A. Well, the main categories of plastics available at that time were, first, the phenolics, which historically I would call the second largest class of plastics, celluloid having been the first—the phenolics, the urea formaldehydes. Both of those are thermosetting materials. There were the celluloses, there were vinyls, there were the acrylics, and methacrylates, which is one class for my purposes. There was polyethylene, and there was polystyrene. That gives us about seven classes of common plastics available in 1950-51.

Q. Were any of those suitable, in your opinion, for the patentee's purposes?

(Testimony of Isador Miller.)

A. None of those would have made a satisfactory hold-down frame.

Q. When you say that, I take it you have reference to the characteristics set forth in the patent as necessary?

A. I have reference to the desired qualities as stated in the patent.

Q. Can you demonstrate what you say with respect to polyethylene? A. Yes.

Mr. Kirschstein: Let me have these marked.

The Clerk: A battery hold-down frame, [220] Plaintiff's exhibit for identification No. 67.

(The exhibit referred to was marked Plaintiff's Exhibit No. 67 for identification.)

Mr. Kirschstein: Your Honor, this is a polyethylene frame that I have made at the request of Mr. Miller.

The Witness: This is a duplicate of it, your Honor.

The Court: Go ahead.

Q. (By Mr. Kirschstein): Would you demonstrate?

A. This frame I would not expect to be able to break over my knee, but (demonstrating).

The Court: You can bend it?

The Witness: Yes.

The Court: Like rubber?

The Witness: Yes. It has no rigidity, no structural strength, your Honor.

The Clerk: There has been marked for identifi-

(Testimony of Isador Miller.)

cation, your Honor, a vessel as Plaintiff's Exhibit No. 68.

(The exhibit referred to was marked Plaintiff's Exhibit No. 68 for identification.)

Q. (By Mr. Kirschstein): Where did this vessel come from, Mr. Miller? A. My ice box.

Q. What is it?

A. It is a vessel exactly similar to the polystyrene vessel—— [221]

The Clerk: Which has been marked 64.

A. (Continuing) ——but it is made of polyethylene.

Q. (By Mr. Kirschstein): Would you show its characteristics?

A. This vessel will just squeeze and will not break. It shows the same type of elasticity that I have demonstrated in the polyethylene hold-down frame.

Q. With respect to the other plastics that you mentioned, would you point out why they would be unsuitable for the patentee's purposes?

A. The first two classes, the phenolics and the urea formaldehydes would be too rigid and therefore unsuitable for the purpose.

In addition to that, the ureas would not stand up under exposure to the electrolyte, the sulfuric acid in the electrolyte.

The celluloseics and the vinyls in use would contain plasticizers which would reduce their dielectric properties and make them unsuitable for the pur-

(Testimony of Isador Miller.)

pose, even if a cellulose acetate frame could be made to have considerable structural strength.

The methacrylate class would also not have the necessary flexibility or rigidity for the purpose, and that would leave only the last two classes which I have demonstrated to be unsuitable by and for themselves. [222]

Q. You have been talking about the years '50, '51, and before then; is that correct?

A. I am trying to throw myself back to that period because of course it is sometimes very difficult to eliminate from your mind what you know at the present time as against what you knew at the time of a given action.

Q. What are the characteristics that the patentee required for his plastic frames?

A. The patentee required a material which would have sufficient building strength to maintain its form and rigidity in use on the battery. It would also have to be non-corrosive so that it would not be subject to attack by the electrolytes. It would have to be substantially a non-conductor so that it would not leak current. It would also have to have a sufficient amount of flexibility and toughness so that it would stay down when clamped down on the battery.

And in addition to that it would have to be made of a material which would neither stick in the mold nor would it adhere to the battery casing itself.

Q. What is——

A. There was one other property, and that is

(Testimony of Isador Miller.)

heat resistance. The material would have to have sufficient heat resistance and a sufficient heat, what shall I call it—a low degree of heat change during use, so that it would not distort under the heat to which it might be subjected in an [223] ordinary automobile.

Q. What is the plastic that the patent discloses for the plastic frames?

A. The patent discloses a modified polystyrene.

Q. What is the modifying material?

A. The modifying material is a Buna S with a high styrene content.

Q. Are you familiar with the term Buna S?

A. I am.

Q. What is a Buna S?

A. Buna S is the general class name that is given to a class of co-polymers which are used as synthetic rubbers, primarily used as synthetic rubbers to replace natural rubber.

Q. What is the origin of the term?

A. The term goes back to the days just before and during the first World War when the Germans, German chemists, developed a synthetic rubber which was made from a substituted butadiene, and in their work on this material they had used the element sodium and the German word for sodium is natrium, and our symbol for sodium is the same as the Latin—is Na, so the name Buna rubber stems from B-u for Butadiene and N-a for sodium. At the present time our synthetic rubbers are not

(Testimony of Isador Miller.)

made with the use of sodium, but the term has still remained in the art.

Q. Where does the "S" come from? [224]

A. The "S" stands for styrene, because the type of synthetic co-polymer which was developed and used in this country during the war years—I am speaking now of World War II—was a co-polymer of butadiene and styrene, in which the styrene acts as a modifying agent for the butadiene.

Q. Are you familiar with the term "GR-S"?

A. I am.

Q. What does that refer to?

A. GR-S is the designation of government rubber styrene. G stands for government, R stands for rubber, S stands for styrene.

Q. Where did this term come from?

A. When the last war broke out the government agencies, of course, realized that one of the great deficiencies in our war supplies would be rubber, since all of the natural rubber had to come from overseas, and one of the first things that was done in Washington on the outbreak of the war was the organization of the Rubber Division of the Reconstruction Finance Corporation to proceed with a program to manufacture synthetic rubber as a replacement for natural rubber.

Q. Do I understand that the production of synthetic rubber was under government control?

A. The production of synthetic rubber was under government control until the last two or three years

(Testimony of Isador Miller.)

ago when the Reconstruction Finance Corporation came to an end. [225]

Q. Is there a standard GR-S?

A. There is a standard GR-S, which is the all-purpose replacement.

Q. For what? A. For natural rubber.

Q. Do you know the composition of standard GR-S?

A. Standard GR-S is a butadiene styrene co-polymer which is made from approximately 75 per cent of butadiene and 25 per cent of styrene.

Q. Can you illustrate that statement with any standard articles or books?

A. I have with me photostats of articles which have appeared from time to time and which give the composition of the butadiene styrene co-polymers.

The Court: Just produce one copy for the exhibit.

The Clerk: There have been marked for identification three publications or articles as Plaintiff's Exhibits 69, 70, and 71.

(The exhibits referred to were marked Plaintiff's Exhibits 69, 70, and 71 for identification.)

The Clerk: There has also been marked for identification Plaintiff's Exhibit 72, another publication.

(The exhibit referred to was marked Plaintiff's Exhibit No. 72 for identification.)

The Witness: Your Honor, may I step down and pick [226] out one of my books?

The Court: Certainly.

(Testimony of Isador Miller.)

I think we will probably gain time if we recess now and you gather your materials.

Evidently your examination is going to be extensive, and if you just hand the exhibit to the clerk to be identified, then we will continue your testimony until this afternoon. You go and get the material that you want identified by the clerk.

The Clerk: I see, your Honor.

The Court: Right now.

Have you identified the exhibits as to which you are going to testify?

The Clerk: In addition there is also Plaintiff's Exhibit No. 73 marked for identification.

(The exhibit referred to was marked Plaintiff's Exhibit No. 73 for identification.)

The Court: Have you identified enough now?

The Witness: I have identified enough to answer this question.

The Court: Is this a good stopping point?

Mr. Kirschstein: It is all right with me, your Honor.

The Court: Incidentally, I want to call your attention to the fact that in a recent opinion that I wrote we have [227] three words that you are using—polymerization, thermosetting compositions, and thermoplastic.

I want you to look at these during the recess and tell me, when you are using the words, if you are using them in this sense.

These definitions are taken from various diction-

(Testimony of Isador Miller.)

aries, including Chambers Technological Dictionary. So I will know if you are talking about something that I have had defined before.

The Witness: Thank you, your Honor. I will do that.

The Court: Recess until 2:00 o'clock.

(Thereupon, at 11:50 o'clock a.m., a recess was taken to 2:00 o'clock p.m.) [228]

March 26, 1958, 2:00 o'clock, p.m.

The Clerk: All parties are present, your Honor.

The Court: All right.

The Clerk: At this time the plaintiffs have marked for identification their Exhibits 74 and 75.

(The exhibits referred to were marked as Plaintiff's Exhibits 74 and 75 for identification.)

ISADOR MILLER

the witness on the stand at the time of recess, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination (Resumed)

Q. (By Mr. Kirschstein): Did you want to mention about the definitions?

A. The definitions?

Q. That his Honor showed you.

The Witness: Your Honor, as far as we are concerned, those definitions are perfect.

The Court: We are in a different field. That was not in the field of plastics. We were talking about emulsions and liquids and I wanted to know if the words "polymerization" and "thermoplastic" and

(Testimony of Isador Miller.)

“thermosetting” are used in this branch in the same manner. [229]

The Witness: Yes.

Q. (By Mr. Kirschstein): Will you proceed to illustrate that?

A. In the July 1944 issue of The Summary of Data on Synthetic Rubber, issued by The Rubber Manufacturers Association, in order to acquaint the general public with the definition of terms in this art, on page 13 the statement is made——

The Clerk: This is Plaintiff's Exhibit 72.

A. (Continuing) ——Buna S is made from butadiene, about 75 per cent, and styrene about 25 per cent. Chemically, a co-polymer of butadiene, C_4H_6 , and styrene, $C_6H_5.C_2H_3$.

That is one reference.

In the 1947 edition of Specifications for Government Synthetic Rubbers, issued by the Reconstruction Finance Corporation, Office of Rubber Reserves, Exhibit No. 70, on page 2, at the top of the page, a section marked Section A-1-a, title GR-S, reads as follows:

“GR-S is a co-polymer of butadiene and styrene to which approximately 1.25 per cent of a standard rubber antioxidant has been added during manufacture. Of the hydrocarbon present in GR-S, approximately 23.5 per cent by weight is derived from styrene.”

In the Vanderbilt Rubber Handbook, which is Exhibit 69, in the 1948 edition, on page 45, there is a table of comparison of copies of the various syn-

(Testimony of Isador Miller.)

thetic rubbers, and one of [230] the rubbers listed is GR-S standard 71/29 butadiene styrene.

And finally in the 1942 handbook, the Vanderbilt Handbook, on page 165, there is the statement:

“The term ‘Buna S’ includes a considerable group of elastomers, and the following comments refer to a co-polymer of 75 per cent butadiene and 25 per cent styrene.”

At this point, your Honor, I wish to say that the Vanderbilt Handbooks are recognized as standard in the rubber industry.

Mr. Kirschstein: I don't think this was marked.

The Witness: That was not marked.

The Court: If all you want is that statement which he has read into the record, there is no use to bring the book in. It is already in the record. There is no use to have a lot of physical exhibits that merely take a page or something like that of a statement. Just identify the title and when published.

Mr. Kirschstein: Vanderbilt Rubber Handbook, Eighth Edition, 1942, edited by J. M. Ball, B-a-l-l, published by R. T. Vanderbilt Co., 230 Park Avenue, New York, New York, copyright 1942, R. T. Vanderbilt Co., New York, New York, all rights reserved.

Q. (By Mr. Kirschstein): Are the other references that you talked about authoritative, also?

A. The reference I gave to the government [231] specifications, 1947 edition, is of course an official government publication of the Rubber Reserve Cor-

(Testimony of Isador Miller.)

poration, which controlled the manufacture of all the synthetic rubber from 1941 up through two or three years ago.

Q. How about the Rubber Manufacturers——

A. The Rubber Manufacturers Association is considered as an official publication of the Associated Rubber Manufacturers of the United States, and they issue bulletins of this sort from time to time in order to arrive at common definitions, as well as facts in the industry, which are quasi-official.

Q. Are there other synthetic rubbers than standard GR-S? A. There are.

Q. Can you identify some of them?

A. There are synthetic rubbers which contain different amounts of styrene in proportion to the amount of butadiene.

Also, I will say at this point, although the products do not refer to us, there are synthetic rubbers which are combinations of butadiene with other polymerizable materials.

Q. So there are GR-S's with different styrene contents than 25 per cent?

A. All GR-S's are rubbers which contain styrene, and [232] the content varies from 25 per cent to other figures.

The Court: And the styrene, as I gather, is the element that when subjected to heat gives it durability, is that it? Or is it the other way?

The Witness: In the way in which you say it, your Honor, if I may say so, it is not quite correct.

The styrene modifies the property of the butadi-

(Testimony of Isador Miller.)

ene, but the styrenes in the butadiene are not there as individual chemical entities, they are in chemical combination, and they cannot be separated physically.

The Court: A combination of the two results in giving us something solid and not breakable?

The Witness: That is correct.

The Court: Such as you have demonstrated by having a pure styrene object constructed and showing they are neither malleable nor breakable, is that correct?

The Witness: That leads me into something that is, I don't think, quite correct in that way.

The Court: By the word "malleable," I meant——

The Witness: They had nothing to do——

The Court: ——which you could twist like a rubber band. That is what I meant by "malleable."

The Witness: Yes, Your Honor, but that is not rubber. That object is not rubber.

The Court: What was that object? [233]

The Witness: It was a polyethelene compound.

The Court: All right.

The Witness: The styrene is a material which in combination with the butadiene plasticizes the butadiene to give it the properties similar to those of a natural rubber

The Court: All right.

And that combination has been known to chemistry for how long?

(Testimony of Isador Miller.)

The Witness: Since approximately 1939, 1940, perhaps 1938.

The Court: And the names that you use are accepted in the chemical industry as names by which you recognize these materials; they are not coined names?

The Witness: They are names which are recognized, but they are not coined by me.

The Court: They are not the type of names which would be subject to a trademark?

The Witness: No, sir. They are material names and they are not subject to a trademark.

The Court: That is what I wanted to bring out. All right.

To illustrate, to go to another field——

The Witness: The word "kodak," for example, it is an artificial name which is now accepted to mean a camera.

Mr. Caughey: I think you would be likely to get an [234] awful lot of argument from the owners of the Kodak Company.

The Court: What I am trying to get at is the terminology with which we are dealing is generally accepted in the art as designating a certain object, is that correct?

The Witness: I believe that is correct, your Honor. That is correct, your Honor.

Mr. Caughey: May your Honor please, I think they do the same thing in this art as they do in the medical art. In the medical art when you have a new product or new compound you submit it to

(Testimony of Isador Miller.)

the AMA, and they give it a name, which may be a coined name, but even though it is a coined name it is the name of the product, because ordinarily the name is so long that they can't use it.

In this art they do the same thing. They submit—It may be a long chemical name, and they submit it to an organization who gives the product a name.

The Court: We had that in the case that was just dismissed from appeal, G.D. Searle vs. Institutional Drug Distributors, where they had a chemical known to the pharmaceutical art, medical art, by a certain name. It is used to avoid seasickness.

The Clerk: Drammamine.

The Court: The word is "Drammamine." The Drammamine, however, is a trade name adopted by Searle for this product, and it has gotten into popular use to such an [235] extent that if you saw the play No Place for Sergeants, you would find that the General in that last very funny scene asked where the Drammamine was.

I departed from the topic merely to have an understanding of the terms.

I believe as the pattern in front of me changes, I want to be certain of the terminology, as we go from one thing to another, and that is why I asked the witness if he uses the words he used this morning as I used them in another case.

So I wanted to know whether these chemicals which he was talking about were designated by the name by which they are known in the trade.

All right. Let's go from there.

(Testimony of Isador Miller.)

Q. (By Mr. Kirschstein): In other words, there are GR-S's with a styrene content higher than that of standard GR-S and lower than that of standard GR-S? A. Yes.

Q. GR-S that is made of butadiene and styrene is Buna S, is it not?

A. That is the standard Buna-S.

Q. What are these GR-S's with styrene contents higher than and lower than that of standard GR-S used for, just generally?

A. They are rubbers which would be used for a special [236] purpose. For example, a Buna S with a higher styrene content might be used to modify the properties of ordinary rubber, and it could be used, the ones with the lower properties—I, myself, for example, have used a 5 to 10 per cent styrene rubber for the purpose of modifying asphalt to make it suitable for use in making airplane runways.

The Court: Let me ask you this question: When you speak of higher and lower, is that used in conjunction with what is known as a standard mixture?

The Witness: That is the common understanding of the word higher.

The Court: What would a standard mixture be?

The Witness: Approximately 25 per cent styrene.

The Court: So anything above that would be higher, or would it?

The Witness: Substantially, the statement is correct, except that—

(Testimony of Isador Miller.)

The Court: I am not trying to get into an argument with you; I am just trying to understand the terms. One of the important things in this patent is the meaning of the word "higher." I want to know, according to your knowledge in the particular industry, whether a word like that is usually interpreted with relation to a standard or not. Otherwise it would be rather nebulous. Higher than what?

The Witness: It is related to the standard rubber, [237] which is 25 per cent styrene.

The Court: All right.

Q. (By Mr. Kirschstein): Would you state the Buna S's with styrene contents higher than the standard in 1947?

A. In 1947 there was one Buna S with a styrene content higher than standard GR-S rubber and that had a content of 43 per cent of combined styrene.

Q. Do you have any reference that illustrates that?

A. I have the reference of the United States Government specifications for the year 1947 to which I referred before, and I believe the clerk has the copy of that.

The Clerk: Plaintiff's Exhibit 70.

The Witness: Page 13 of this exhibit under the designation GR-S 40 AC, the description is given: "Of the hydrocarbon present, approximately 43 per cent by weight is derived from styrene."

Q. (By Mr. Kirschstein): Does the term Buna

(Testimony of Isador Miller.)

S with a high styrene content have a meaning in the plastics and rubber art?

A. It refers to the available rubbers with a content of styrene higher than that of a standard GR-S.

Q. So the one you just referred to would be one such, is that correct?

A. The one I referred to is such a rubber.

Q. In 1951 what Buna S's with high styrene content were [238] known then?

A. In 1951 there was a Buna S known with a content which is stated in the literature to be 50 per cent, but which actually refers to this 40 AC——

Q. 50 per cent styrene?

A. I beg your pardon. With a styrene content of 50 per cent, in other words it was a 50-50 mixture, but it actually refers to the 40 AC. And there was also known at that time at least one rubber with a styrene content higher than 50 per cent, namely, co-polymer 3 of the Dewey and Almy Company.

Q. Were there any others known then?

A. In 1951 there was probably a 35 per cent styrene content rubber known.

Q. Would that be a Buna S with a high styrene?

A. That would be a Buna S with a high styrene content.

Q. Would you refer to the references substantiating your statements for 1951?

(Testimony of Isador Miller.)

A. In 1951 the references which give the Buna S content of these higher styrene rubbers are in an article in the *Modern Plastics* for 1950.

Q. Do you have anything else?

A. And then I have the references to the content in 1947, and the references to content in 1948 and 1952.

Q. What is the reference in 1948? [239]

A. The reference in 1948 is a *Vanderbilt Handbook*, Ninth Edition, for 1948, which gives the composition of various rubbers known at that time.

Q. Would you show his Honor the part that you are referring to there that has these different contents?

Mr. Proujansky: May I ask, your Honor, that in addition to showing it to your Honor, the witness repeat it aloud?

The Court: Yes, certainly. This is part of an exhibit. This is 69. He is reading from Exhibit for identification No. 69, so he refers to the page, and——

The Witness: We are introducing the entire exhibit.

The Court: They intend to introduce the entire exhibit. You are referring to page 43 of that exhibit, are you?

The Witness: I am referring to page 42, particularly.

On page 42 there is given here, for example——

The Court: You read it so counsel can hear it.

The Witness: On page 42 of that exhibit under

(Testimony of Isador Miller.)

the general heading of Regular Polymers, there is stated a polymer with a butadiene content of 65 per cent and a styrene content of 35 per cent.

Q. (By Mr. Kirschstein): Do you find on that page a [240] Buna S with a low styrene content?

A. On that page is also given a butadiene 95 per cent, styrene 5 per cent.

Q. Would you refer to page 45, please?

A. On page 45 we have a list of rubbers, which includes a 50-50 butadiene-styrene rubber, a 65-35 butadiene-styrene rubber, and a 95-5 per cent styrene rubber, as well as standard GR-S with 71-29 per cent butadiene styrene.

Q. Would you read the material on the right-hand column?

A. On the right-hand column under the general title "Monomers (Charge Ratio)," the heading of the column is "Results Imparted." The title is "Higher Styrene," and the words are eliminated, but I will read the contents.

"Higher styrene gives higher tensile, modulus, and hardness. Easier breakdown, more thermoplastic, smoother. Less shrinkage. Good in hard rubber and extruded goods. Higher freeze point than GR-S standard."

Q. Go on.

A. It continues, "High Butadiene." In other words, low styrene, poor processing, lower physical properties, lower freeze point.

Q. What Buna S with a styrene content was known in 1952?

(Testimony of Isador Miller.)

A. In 1952 we had butadiene styrene rubber with a [241] 42-44 per cent styrene content, and at least one butadiene styrene rubber with a 70 per cent styrene content.

Q. Do you have a reference that substantiates what you say for 1952?

A. The reference is the government specifications for the year.

Q. What exhibit is that?

A. That is Exhibit No. 71.

Q. What page of Exhibit 71 does the specification for standard GR-S occur on?

A. The specification for standard GR-S occurs in this exhibit, if it please your Honor. The pages are not numbered. They are designated by title.

The Court: All right.

The Witness: GR-S 1000, which is the standard GR-S, it gives the composition as bound styrene 22½ to 24½ per cent. [242]

Q. On what page did you find the 42 to 44 per cent styrene?

A. GR-S No. 1013, bound styrene 42 to 44 per cent.

The date of each of those pages is 10-1-52.

Q. Can you find any specifications for rubbers with low styrene content?

A. GR-S No. 1015, bound styrene 2.5 to 4.5 per cent. GR-S No. 1023.

Q. What is the bound styrene in 1023?

A. Bound styrene 12.0 to 14.0 per cent. And GR-S Nos. 1500, 1501, and 1502: 1500, 19.0 to 21.0

(Testimony of Isador Miller.)

per cent. 1501, 19.0 to 21 per cent. 1502, 19.0 to 21 per cent.

The Court: I gather that the industry from time to time as they were making experiments were changing the amounts, without changing the component elements, so as to arrive at more satisfactory products——

The Witness: For given purposes.

The Court: For different purposes, is that correct?

The Witness: That is correct, your Honor.

I will also call your attention, your Honor, to the fact that in order for any manufacturer to make any of these different products he had to obtain permission from the Rubber Reserve Corporation.

Nobody was permitted to make any rubber that he [243] wished to make.

The Court: That is during the war years?

The Witness: Afterwards, also. Up to about two or three years ago. As long as the Rubber Reserve Corporation was in existence and controlled the industry. It is now free.

The Court: They even sold——

The Witness: Within the last two years all the plants have been sold with the exception of one.

The Court: They sold the plants where they were raising a particular rubber-producing plant.

The Witness: All the plants with the exception of one were sold.

The Court: That is in keeping with the manner in which we liquidate properties after the war.

(Testimony of Isador Miller.)

Q. (By Mr. Kirschstein): I hand you Plaintiff's Exhibit 63 and ask you to read it.

A. I have read the first portion of it.

Q. I refer you to paragraph 2, which you will understand is the composition of the Kravex frame. Is a frame made of that material a plastic frame?

A. It is.

Q. And what is the plastic it is made of?

A. It is a modified polystyrene plastic, which the modifying agent is a Buna S with a high styrene content.

Q. What is the basis for saying that the polystyrene is [244] modified?

A. The statement in the stipulation which reads: "It is composed of a physical mixture consisting of a predominant amount of polystyrene, a minor amount of co-polymer of butadiene and styrene."

Q. What is the basis for saying the co-polymer is a Buna S with a high styrene content?

A. Reading from the stipulation in the same paragraph, it continues: "The co-polymer consists of butadiene in the range of 58 per cent to 62 per cent by weight and styrene in the range of 38 per cent to 42 per cent by weight."

Q. Have you had occasion to handle an example of the Kravex frames? A. I have.

Q. Where did you get it from?

A. I obtained it from counsel.

Q. From me? A. Yes, sir.

Q. Do you have the frame that you handled with you? A. I have.

(Testimony of Isador Miller.)

Q. What exhibit is it?

A. This is Plaintiff's Exhibit No. 74 for identification.

Q. Did you do anything with it?

A. I took this frame and I placed it in a vise in an [245] attempt to bend it.

Q. Did you draw any conclusion from your efforts to bend it?

A. What I did exactly was I placed this frame on one side in the vise and bent it through an angle of 90 degrees, at which point I obtained a slight crack in the side which was being bent. I took it out and examined it and then placed the same side back in the vise and re-bent it, and the frame cracked both at the point of the bend and also along the side—at one corner, on one of the short sides near one of the corners. I then took the frame and placed the opposite side in the vise in order to bend it only once, to show the effect of bending it, and I bent this side through an angle of 90 degrees, and then it came back—that did not break on a single bend, but it came back to approximately an angle of 45 degrees.

Q. Did you try to bend it out of a vise?

A. I did. I could not do it.

Q. Did you try to break it out of a vise?

A. I did. I could not do it.

Q. Did you draw any conclusions as to the characteristics of the modified polystyrene in that frame as compared to plain polystyrene?

A. The polystyrene in that frame is vastly su-

(Testimony of Isador Miller.)

perior in its properties to general-purpose polystyrene.

Mr. Kirschstein: Would you mark this, please?

The Clerk: There has been marked for identification Plaintiff's Exhibit No. 76.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 76 for identification.)

Q. (By Mr. Kirschstein): I show you Plaintiff's Exhibit No. 76 for identification and ask you if that contains any information regarding the properties of the plastic of which the Kravex frame is made?

A. These pages are not numbered, your Honor, but on the last page——

The Court: You can identify it.

The Witness: On the inside cover there is a table of properties of molding material TMD 2155, and a list of its properties.

The Court: I don't think you have identified where these pages come from.

Mr. Kirschstein: Your Honor, that is a brochure of the Bakelite Company, Exhibit 76.

The Court: Go ahead.

Q. (By Mr. Kirschstein): Mr. Miller, would you refer to paragraph 4-A of Exhibit 63, the stipulation, and read that, please?

A. I have read it.

Q. You will understand that this gives the composition of plastic battery hold-down frames made by the plaintiff at [247] one time. Were frames made of this material, plastic frames?

(Testimony of Isador Miller.)

A. They were.

Q. What was the composition of those plastic frames?

A. Reading from the stipulation, the frames were made from a physical mixture consisting of a predominant amount of polystyrene, a minor amount of a co-polymer known as Darex Co-polymer No. 3.

The Court: Darex is a trade name?

The Witness: Darex is a trade name of a product made by the Dewey and Almy Company.

Q. (By Mr. Kirschstein): What type of plastic is it?

A. This is a polystyrene modified by a Buna S with a high styrene content.

The Court: Dewey and Almy Chemical Company? Is that the same circular—no. It is referred to in the file wrapper. It is one of the exhibits—it is part of the file wrapper. I can't tell the paging.

Mr. Kirschstein: That circular, your Honor, is part of the file wrapper, and gives the composition of the Darex co-polymer No. 3.

The Court: That is what I say. I have read the file wrapper there and I find the reference to Darex co-polymer No. 3. The date of the particular circular is May 1949.

Is that the same circular?

The Witness: That is the same one. [248]

The Court: All right.

Q. (By Mr. Kirschstein): I take it your basis

(Testimony of Isador Miller.)

for the characterization of the material as polystyrene modified by the addition of Buna S with a high styrene content is the same as you spoke of before with respect to the Kravex frame?

A. It is the language of the stipulation which gives me the composition of co-polymer No. 3.

Q. In other words, the use of the word "predominant" and the physical mixture and the amounts of styrene and the co-polymer—is that correct?

A. That is correct.

Q. Now, would you look at paragraph 4-B, please?

The Court: You are still talking about the stipulation?

The Witness: I have read it.

Q. (By Mr. Kirschstein): You understand that shows the composition of plaintiff's frames at one time, also. Since it shows they were made of the same material that paragraph 2 shows the Kravex frame is made of, I take it your testimony would be the same with respect to that?

A. My testimony would be the same. It is made of a polystyrene modified with a Buna S of a high styrene content.

Q. Now, would you read paragraph c, please, 4c of the stipulation?

The Clerk: This is Plaintiff's Exhibit No. 63 for [249] identification and in evidence.

Mr. Kirschstein: Yes.

The Witness: I have read it.

Q. (By Mr. Kirschstein): You will understand

(Testimony of Isador Miller.)

that this gives the composition of Plaintiff's frame since about November 1952. Were frames made of this material, plastic frames?

A. They are.

Q. What is the plastic they are made of?

A. Modified polystyrene.

Q. And what is the polystyrene modified with?

A. Both of the ingredients which are mixed, each of them is a polystyrene mixed with a Buna S with a high styrene content.

Q. You say each of them. Why do you say each of them?

A. Because the stipulation says that the frame is manufactured and is composed of a physical mixture of Bakelite brand TMD 2155, and a material furnished by Monsanto Chemical Company. The last-mentioned composition is expressly designated as Lustrex Hi-Test 89.

Q. Now, the Bakelite brand TMD 2155 is the material that you have characterized before, is that correct?

A. That is correct.

Q. What is the Monsanto material?

A. The Monsanto material is composed of a physical mixture consisting of a predominant amount of polystyrene and a [250] minor amount of a co-polymer of butadiene and styrene. The co-polymer consists of butadiene in the range of 60 to 50 per cent by weight and styrene in the range of 40 to 50 per cent by weight.

Q. How would you describe that Monsanto material?

(Testimony of Isador Miller.)

A. The Monsanto material is a modified polystyrene modified by Buna S with a high styrene content.

Q. Have you had occasion to test Plaintiff's present frame in a manner similar to the Defendant's frame? A. I have.

Q. Were you able to break it yourself?

A. I was not. I have the frame here.

Q. That frame is what?

A. Is marked Plaintiff's Exhibit——

Q. 75? A. ——75 for identification.

The Court: The one I just looked at, is that the accused device?

The Witness: This one is the accused device.

The Court: This is the plaintiff's device that he tried to break, also, Exhibit 75.

Q. (By Mr. Kirschstein): I show you Plaintiff's Exhibit 73 for identification, which is a brochure showing the physical properties of the Monsanto material Lustrex Hi-Test 89, and ask you from that bulletin and from your experience with [251] the plaintiff's frame you came to any conclusion regarding the characteristics of the modified polystyrene.

A. The modified polystyrene has properties suitable for use in arriving at the properties desired in a plastic hold-down frame.

Q. You mean the properties set forth——

A. The properties set forth in the table of properties.

(Testimony of Isador Miller.)

Q. You are speaking now of the plaintiff's frame that is covered by paragraph 4c, is that correct?

A. Of the stipulation, that is correct.

Mr. Kirschstein: Plaintiff offers in evidence Exhibits 64 through 76 for identification.

The Court: They may be received.

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits 64 through 76.)

Mr. Kirschstein: That is all.

The Court: I understand you have completed your direct examination now?

Mr. Kirschstein: Yes, sir.

The Court: Then we will take a short recess.

(Recess taken.)

The Clerk: All parties are present, your Honor. Isador Miller, heretofore sworn, resumes his testimony.

The Court: All right. [252]

Cross Examination

Q. (By Mr. Halle): Mr. Miller, you testified about Buna S's. Is that what we have been talking about here today, different types of Buna S's, or should I put it this way, or a type of Buna S with varying amounts of styrene in it?

A. That is correct.

Q. You have also told us about the government regulations and specifications for GR-S.

A. That is correct.

(Testimony of Isador Miller.)

Q. What is the Buna S with the highest styrene content that you have told us about?

A. 70 per cent styrene.

Q. And what is that?

A. Darex Co-polymer No. 3.

Q. Is that the Darex Co-polymer No. 3 mentioned in the suit patent? A. It is.

Q. Do you know of any Buna S with a higher styrene content than that?

A. I know of Buna S with an 85 per cent content.

Q. What would that be?

A. That would be a Buna S with a high styrene content.

Q. Would it have a trade name?

A. It is one of the products made by Dewey and Almy. [253]

Q. Would that be Dewey and Almy X-34?

A. I don't know.

Q. Do you know of any other company that makes a Buna S with a high styrene content?

A. I know Goodrich puts out a Buna S with a high styrene content and I believe Dow also.

Q. Did you ever hear of a product called Pliolite S-3? A. I did.

Q. Do you know what the styrene content is in that? A. I do not.

Q. But in any event we have discussed today Buna S's with a high styrene content as high as 85 per cent; is that correct? A. Correct.

Q. I hand you Plaintiff's Exhibit 72 and ask you

(Testimony of Isador Miller.)

whether that was the exhibit from which you obtained information that some time in 1940, I believe you testified it was—was it 1942?

A. It was 1944.

Q. 1944, that a Buna S standard was 75 per cent butadiene to 25 per cent styrene; is that correct?

A. That is correct.

Q. Now, I also hand you—is that a government regulation, that paper I handed to you?

A. No, sir. [254]

Q. Who puts that out?

A. Rubber Manufacturers Association.

Q. Do you know where they get their information from? Do they get it direct from the government regulations? A. I would assume so.

Q. So that the source material for something like that would be a paper like Exhibit 70, which is issued by the Reconstruction Finance Corporation, effective January 1, 1947—would that be correct?

A. That would be correct?

Q. Now, I just handed you that Exhibit 70, and I ask you whether that contains the standards for the GR-S's for the year 1947. A. It does.

Q. Are you familiar with the exhibit?

A. I am.

Q. Have you studied it carefully?

A. I believe I have.

Q. Could you tell me the GR-S in that exhibit with the highest styrene content?

A. GR-S with the highest styrene content is No. 40 AC.

(Testimony of Isador Miller.)

Q. What is the styrene content?

A. 43 per cent by weight.

Q. Now, do you know of any other GR-S in the year 1947 that had a higher styrene content than 43 per cent by weight? [255]

A. I don't know when Dewey and Almy started to manufacture copolymer No. 3. This is the highest content that I know of for that year.

Q. Aside from the Dewey and Almy product that is mentioned in the patent, that is the highest styrene content that you know of that could have been obtained in 1947?

A. That was being manufactured in 1947.

Q. I hand you this other exhibit that you produced here today, Exhibit 71, which is the Reconstruction Finance Corporation specifications for government synthetic rubbers, October 1, 1952; do you know what the highest styrene content cited in that publication is?

A. 42 to 44 per cent.

Q. We have 42 to 44 per cent, and that is one per cent higher than the 43 per cent that was cited in 1947?

A. That is correct.

Q. Now, I want you to review in your mind the GR-S specifications that you are familiar with from the time the government started, which I would assume was at the beginning of World War II—am I correct?

A. That's right.

Q. —until 1952, and I want you to tell me if you know of a GR-S with a styrene content higher than 44 per cent. [256]

(Testimony of Isador Miller.)

A. There was a GR-S with a styrene content of 50 per cent available during those years.

Q. All right. Was there a GR-S with a styrene content higher than 50 per cent available at any time?

A. There was.

Q. When?

A. During the latter part of those years.

Q. And what was the percentage in that?

A. 70 per cent.

Q. Now, I want you to listen to the question very carefully. We are talking about a GR-S now, not a Buna S. What is a GR-S?

A. GR-S is government rubber styrene, butadiene-styrene co-polymer.

Q. And those standards are set by the government, are they not?

A. They are.

Q. I would like you to pick out from your exhibits the standards for 70 per cent GR-S, 70 per cent styrene.

A. They are not shown in these exhibits.

Q. Are they shown anywhere in Government specifications for a GR-S?

A. They are not shown for a GR-S.

Q. Of course not.

The highest GR-S shown is 50 per cent, is it not?

A. The highest GR-S shown in these government publications which I have presented is 50 per cent.

Q. And that is true for any government publication concerning a GR-S?

A. It is true for any government publication which I have seen.

(Testimony of Isador Miller.)

Q. I didn't hear you.

A. It is true for any government publication which I have seen during this year.

Q. Or that you have ever seen?

A. That I would not remember.

Q. You don't remember? A. No.

Q. We are talking about relative terms here, about high styrene content, and it has got to be higher than something. Now, in the suit patent Mr. Coleman mentions a Buna S with a high styrene content. Is that the same as a GR-S with a high styrene content?

A. The term GR-S and Buna S are used interchangeably.

Q. They are used interchangeably?

A. They are used interchangeably in the trade.

Q. But there is no GR-S in government regulations that you know of higher than 50 per cent styrene?

A. There is no GR-S in any of these publications higher than GR-S. [258]

Q. Higher than 50 per cent?

A. Than 50 per cent, yes. [259]

* * * * *

Q. (By Mr. Halle): I believe you testified that a major amount of polystyrene modified by a minor amount of a copolymer with 38 to 42 per cent styrene constituted a high styrene copolymer modifying polystyrene; is that correct?

A. I don't believe it is correctly stated as you stated it, Mr. Halle.

(Testimony of Isador Miller.)

Q. Well, let me ask you this: Do you believe that any copolymer of butadiene and styrene over 25 per cent is a high styrene copolymer? [262]

* * * * *

The Witness: Insofar as that is an available material, I do.

Q. (By Mr. Halle): Well, is there an available material with 25 per cent styrene in it?

A. Not that I know of.

Q. Well, is there an available material with 29 per cent styrene in it?

A. Not that I know of.

Q. Is there an available material with 40 per cent styrene in it? A. There is.

Q. Is there——

A. There is a material with a range between 38 and 42 per cent, so that certain lots of it could very well be 40 [263] per cent.

Q. You did say you didn't know of a material available with 29 per cent styrene in it?

A. I do not.

Q. I show you the exhibit you produced before, Exhibit 69, which is the handbook for 1948, I direct your attention to page 45, and where it says "GR-S Standard," does it not say 71/29 butadiene styrene?

A. It says 71/29 butadiene styrene, but that does not mean that the 29 per cent is the styrene content of that rubber.

Q. What does it mean?

A. It means that in the make-up of that rubber 29 per cent of styrene is permitted to the manufac-

(Testimony of Isador Miller.)

turer to put into the batch. But the batch never ends up with a 29 per cent styrene content. And during those years covered by this bulletin the permissible styrene content was $23\frac{1}{2}$ or an average of $22\frac{1}{2}$ to $24\frac{1}{2}$ per cent.

Q. Do you know what the government principally needed the rubber for.

A. The rubber was being used as a replacement for natural rubber.

Q. For truck tires? A. For truck tires.

Q. And other rubber items needed for the war effort? [264]

A. And other rubber items.

Q. Do you know whether or not we are still under these rubber regulations today?

A. No, sir.

Q. We are not required to adhere to them at all?

A. No.

Q. Do you know whether or not there is still a standard for the rubber industry?

A. So-called 75-25 per cent is still a standard grade of all-purpose rubber.

Q. And is that in the rubber industry?

A. In the rubber industry.

Q. How about the plastics industry?

A. In the plastics industry?

Q. Yes, sir.

A. That is not true in the plastics industry.

Q. What is the standard in the plastics industry?

(Testimony of Isador Miller.)

Mr. Kirschstein: I object. The standard of what? I don't understand the question.

The Court: Standard combination such as he is talking about.

The Witness: May I answer?

The Court: Yes.

The Witness: There is no such thing.

Q. (By Mr. Halle): There is no standard in the plastics industry, is there? [265]

A. There is no standard for rubber, because rubber does not exist except as an aid to the plastics industry. But rubber is not in the plastics industry.

Q. I see. When we are using polystyrene modified by a co-polymer of a Buna S are we in the plastics industry or are we in the rubber industry?

A. We are in the plastics industry.

Q. What is the standard in the plastics industry? A. We have no standard. [266]

* * * * *

Q. I show you a technical bulletin of the Dewey and Almy Company, which is part of Plaintiff's Exhibit 2, the file wrapper of the suit patent. Have you ever seen that bulletin before? A. I have.

Q. You note the date on it? [267]

A. May 1949.

Q. Would that indicate to you when Darex co-polymer No. 3 became available?

A. No, sir.

Q. Would it have been before that?

A. It might have?

(Testimony of Isador Miller.)

Q. Are you familiar with a publication by Whitby entitled Synthetic Rubber?

A. I have seen it.

Q. Is it a standard work in the rubber industry?

A. It is a standard work.

Q. Is it also a standard work in the plastics industry?

A. I don't think so.

Q. Doesn't it mention plastics?

A. I don't remember. I have a copy in my own library, but I haven't looked at it for a long time.

Q. Whether it is a standard work in the plastics industry, or not, is this a standard reference work that is considered by experts?

A. It is a standard reference work for rubber.

Q. For rubber, all right.

When you say "rubber," you also mean synthetic rubber, don't you?

A. I do.

Q. I am going to read from page 629 of the [268] Whitby publication. The title of the book is Synthetic Rubber. It is prepared under the auspices of the Division of Rubber Chemistry and Chemical Society, and the Editorial Board is headed by G. S. Whitby, Editor in Chief, published by John Wiley & Sons, Inc., New York, and I believe the copyright date is 1954. At the bottom of page 629 there is a sub-heading called "High Styrene Resins," and in the paragraph that follows, and I am going to go to the middle of page 630, the middle of the first paragraph on page 630:

"The first description of the properties and applications of a commercially available styrene-buta-

(Testimony of Isador Miller.)

diene resin (Pliolite S-3, a 15/85 butadiene-styrene co-polymer) was published in 1946 as the outgrowth of work by Borders, R. D. Juve, and Hess. Descriptions of other high styrene resins were subsequently made by Jones and Pratt, and Fox. General information on high styrene polymers was summarized by Winkelmann, Fordyce, and others."

Do you agree with the statement I just read?

A. I have no reason not to believe it.

Q. You have no reason not to believe it?

A. Not to believe it, yes.

Q. According to that statement, Pliolite S-3 is a 15/85 co-polymer, is that right?

A. It is designated there as a resin. It is a 15/85 co-polymer. [269]

Q. And that is a resin? A. It is a resin.

Q. And that means it has 85 per cent styrene in it? A. That is correct.

Q. And they say that is the first one that became commercially available?

A. That is right.

Q. And that was some time in 1946 that they wrote about it.

Is there any difference between a resin and a rubber?

A. There is.

Q. What is the difference, sir?

A. Difference in uses or properties?

Q. Well, can you have a rubber with 85 per cent styrene in it?

A. That is one of the peculiarities of the nomen-

(Testimony of Isador Miller.)

elature in the trade, that these high styrene co-polymers are known as rubbers, whereas strictly speaking if one wanted to be exact it would not be designated that way. But it is accepted in the trade that high styrene co-polymers are rubbers.

The Court: What would be your definition of a resin to contra-distinguish it from rubber?

The Witness: The properties, your Honor.

The Court: Supposing you were teaching a class [270] and you were asked to explain the word "resin"?

The Witness: In the first place, your Honor, a rubber must have some degree of elongation, and more important than that it must have the property of coming back; when you stretch it, it comes back. Resins do not have that property.

Q. (By Mr. Halle): The Darex co-polymer No. 3 that we were talking about with a 70 per cent styrene, is that a resin, too?

A. That is known in the trade as a Buna S with a high styrene content, and I am quite sure that Pliolite S-3, according to your reading of the text, is also a Buna S with a high styrene content, and to my mind would be an equivalent for certain purposes.

The Court: Equivalent of what?

The Witness: Darex No. 3.

Q. (By Mr. Halle): Now, would you kindly answer my question? I want to know whether Darex No. 3 is a resin.

(Testimony of Isador Miller.)

A. No, sir. Darex No. 3 is known in the trade as a Buna S with a high styrene content.

Q. Is that also true of Pliolite S-3?

A. Yes, sir.

Q. Did you refer to Pliolite S-3 a few minutes ago as a resin? A. I did not. [271]

Q. I misunderstood, but I thought you did.

A. I don't believe I did. If I did, I didn't mean to.

Q. I asked you whether a co-polymer with a styrene content of 85 per cent of butadiene-styrene co-polymer, with a styrene content of 85 per cent, was a resin.

A. I believe I said that a co-polymer of butadiene and styrene with a high content of styrene is still called a—or with a content equal to 85 per cent of styrene, is still known in the trade as a Buna S with a high styrene content.

Q. Well, do some people call it a resin?

A. I do not know.

Q. Is there such a thing as a synthetic rubber resin? A. Yes, sir.

Q. And would Darex No. 3 be synthetic rubber resin? A. No, sir.

Q. Well, what is a synthetic rubber resin?

A. When one speaks of a synthetic rubber resin one refers entirely to the hydrocarbon; not to the product which may contain a certain ratio of material.

Q. Let's get back to what a resin is.

Did you define a resin for us before?

(Testimony of Isador Miller.)

A. I defined a resin as distinguished from a rubber. The term "rubber" is a class term as well as a specific term. Complex organic compounds are very frequently grouped as resins, but that is a very loose way of using the term, and it [272] is used in the same way as, for example, the term "alcohol" is a class name, but most people when they speak of alcohol speak of ethyl alcohol.

The Court: Let's stop for a minute, as long as we had the witness agree to some definitions which I used before. Let's see if we can't agree on the definition of resins, synthetic resins, as are contained in the same dictionary, Chambers Dictionary.

Do you recognize this small dictionary? This is Chambers.

The Witness: I do.

The Court: I have turned it to the word "resin." Will you read the definition there, resin chemistry? I have a clip at the next one which gives synthetic resin.

The Witness: (Reading) "Resin. The product from the secretion of the sap of certain plants and trees. Resins are hard, fusible and more or less brittle, insoluble in water, soluble in certain organic solvents. They consist of resinous matter, that is, certain highly polymerized acids and neutral substances mixed with terpene derivatives. See also rosin and synthetic resins."

The Court: Now, turn to the next page where I put the clip, and I have got synthetic resins there, and read those definitions.

(Testimony of Isador Miller.)

The Witness: "Synthetic resins. Resinous [273] compounds made from synthetic materials, as by the condensation or polymerization of phenol and formaldehyde, formaldehyde and urea, glycerol and phthalic anhydride, polymides, vinyl derivatives, et cetera.

"Synthetic resin"—shall I continue?

The Court: No, you don't need to.

All right.

Does that give us a start?

The Witness: That gives us a start.

I would subscribe to both of those definitions.

Q. (By Mr. Halle): Whitby, which I read from before, maybe I became confused or maybe you did. I started reading a chapter called—not a chapter, a sub-chapter called "High Styrene Resins," that is the sub-heading on page 629, and then I turned to page 630 of that first paragraph and I read about Pliolite S-3, and I believe I then asked you if Pliolite S-3 was a resin, and you said it was a resin.

A. According to the definition of Whitby it is a resin.

Q. Can we have the same material under different definitions?

A. Whitby is trying to distinguish there between a quasi or a semi-scientific definition, and I define the material with 85 polystyrene resin as a commercial definition.

Q. As a commercial definition?

A. As a commercial definition. [274]

(Testimony of Isador Miller.)

Q. What is your commercial definition, then?

A. Copolymer of butadiene and styrene with a content of 85 per cent combined styrene is a high styrene Buna S.

The Court: Could a change of percentages change a resin into what would be a rubber?

The Witness: No, your Honor. But I am speaking of commercial practice.

The Dewey and Almy bulletin, for example, is a bulletin entitled Dewey and Almy Copolymer No. 3, and starts off——

The Court: Is that the one counsel showed you?

The Witness: Yes.

I will show you my copy, which is easier to read, and I think it may be easier for your Honor.

The Court: Go ahead.

The Witness: Paragraph 2 of that bulletin says——

The Court: Wait a minute. Let's see if we have the same one.

The Witness: The first paragraph starts, "One of the first"——

The Court: That's right.

The Witness: The second paragraph starts "Darex Copolymer No. 3 is an elastic type of synthetic rubber resin made by copolymerizing butadiene and styrene to produce a Buna S with a high styrene content." [275]

The Court: In other words, you object to the use of the word "rubber" and you would call that a resin and not a rubber; is that it?

(Testimony of Isador Miller.)

The Witness: That is correct, your Honor.

The Court: And you say in the trade they combine the two to designate something that couldn't be called rubber in pure chemical terms, is that the idea?

The Witness: That is correct, that is exactly my position, your Honor.

The Court: All right.

Mr. Halle: Let me see if I can understand that.

Q. Did I understand you to say, sir—

The Court: Have you this one in front of you?

Maybe you had better look at this. The reason is they use both words, rubber and resin. He says that rubber is improperly used because it is a resin.

The Witness: No. Resin is improperly used. No. Rubber is improperly used.

The Court: Because this is a resin?

The Witness: That is correct.

The Clerk: There has been marked for identification Defendant's Exhibit J.

The Court: All right. Maybe you can throw some light on something.

(The exhibit referred to was marked as Defendant's Exhibit J for identification.) [276]

Q. (By Mr. Halle): With this start, would you tell us scientifically the highest amount of styrene in a copolymer that you would call rubber, as distinguished from a resin?

A. I cannot answer that question, Mr. Halle.

Q. Should I specify a copolymer of butadiene and styrene?

(Testimony of Isador Miller.)

A. That is not the reason I cannot answer that question.

I cannot answer your question because you asked me for a scientific definition.

Q. Well, I will reframe it. You said that you felt that these things should not be called rubbers, because they were really resins, and the use of the term "rubber" and "resin" was a loose use of terminology. Where would you draw the dividing line?

A. The dividing line is in the question of properties. These materials with the high styrene content which are known in the trade as rubbers have rubber properties. They are elastic, they can be vulcanized, and in fact they have to be vulcanized in order to be used by themselves. They are true rubbers in property.

Q. I wish you would try to answer my question.

The Court: He is trying to answer. Let him finish. He is explaining why in his opinion they have some of the qualities of rubber but they are not chemically speaking rubber.

Isn't that what you are trying to tell us?

The Witness: That is correct, your Honor. [277]

The Court: Let him finish.

The Witness: They should be classified as rubbers, because they have the properties and the uses of rubber.

Q. (By Mr. Halle): Then in this Exhibit J where they call them rubber and resins, the use of the term "resin" is incorrect, is that it?

A. The use of the term "resin" is a loose term,

(Testimony of Isador Miller.)

and "resin" is a class name that certainly would apply generally to these materials. Because, for example, in natural rubber you speak of hydrocarbon resin, and that is not a mixture.

The Court: Would it be proper to say that a resin might have the qualities of rubber, and the reverse not be true?

The Witness: If you take the definition in Chambers, the definition in Chambers where he speaks of resin refers to rosin, materials like copal, kauri, and materials of that nature which are natural products which result from the exudation from a tree or insect life and are hardened material, which nature hardens by itself after the material is taken from the natural environment, in his definition of synthetic resins he has given definitions of materials which are made by a reaction between two or more chemical compounds. He has not in any way covered the type of product which is in synthetic rubber.

The Court: All right. [278]

Q. (By Mr. Halle): Are you familiar with a publication known as Modern Plastics Engineering Handbook?

A. I am. That is an old title.

Q. What? A. That is an old title.

Q. I have some pages here from the 1956 edition. I am sorry I don't have the whole book with me.

The Clerk: There has been marked for identification, your Honor, Defendant's Exhibit K.

(Testimony of Isador Miller.)

Q. (By Mr. Halle): I am going to read from page 157 of the publication that I quoted. The article is called: Synthetic Rubber and Rubber Derivatives, by Donald S. Black, and down here in the middle of the page there is a sub-title Butadiene-Styrene Copolymer, and I read:

“The most common and widely used of the synthetic rubbers today is the copolymer of butadiene and styrene—GR-S (government rubber styrene).

“Butadiene and styrene are reacted in a range of ratios between virtually 100 per cent butadiene to 50 per cent butadiene/50 per cent styrene. With products containing higher levels of styrene the polymer takes the form of a resin rather than an elastomer. This allows a wide range of finished products with varied physical characteristics.”

Do you agree with that statement, sir? [279]

A. Certainly not.

Q. What is wrong with it?

A. I would rather not say from memory. If you will let me have the publication, I will read it to you.

The Court: Let him take a look. He has a visual memory.

The Witness: Mr. Halle, will you show me what you read?

Mr. Halle: Starting over here, I read, “The most common,” down to “characteristics.”

The Witness: The statement “With products containing higher levels of styrene the polymer

(Testimony of Isador Miller.)

takes the form of a resin rather than an elastomer” is a statement with which I cannot agree.

Q. (By Mr. Halle): Sir, that is a relative statement, is it not?

A. Not to me. That is a definite statement which I do not agree with.

Q. Could we say that a resin is less elastic than an elastomer? A. No, sir.

Q. Is it more elastic?

A. It is not elastic.

Q. It is not elastic at all?

A. A resin is not elastic. [280]

Q. It is non-deformable, non-resilient?

A. It hasn't got the property of elongation and coming back.

Q. An elastomer has the property of elongation and coming back? A. Yes.

Q. Isn't it true as you add the styrene content to a copolymer of butadiene and styrene, that it becomes less of an elastomer?

A. Will you say that again, please?

Mr. Halle: Would you repeat the question?

The Court: Read the question, Mr. Goldstein.

(Question read by the reporter.)

The Witness: In comparison to what?

Q. (By Mr. Halle): Well, now, you gave us a standard of 75/25. Let's use your standard.

A. It has not got the properties of a 75/25—

Q. Let's not get confused. Let's start with your standard. We are starting with the 75/25. Is that an elastomer? A. It is.

(Testimony of Isador Miller.)

Q. I believe you said there was a 60/40 GR-S, is that correct?

A. Substantially correct.

Q. Is that less of an elastomer than the 75/25?

A. No, sir. It isn't an elastomer—it has less elastic properties, but it still by definition is an elastomer.

Q. You are quite right, both are elastomers, but one is more elastic than the other? A. Yes.

Q. The one with the lower styrene content is more elastic than the one with the higher styrene content? A. That is correct.

Q. When do we reach the point where there is no elasticity by adding styrene to the copolymer?

A. When you have 100 per cent styrene.

Q. And supposing you have 90 per cent styrene?

A. I would not know.

Q. Let's say you have 85 per cent styrene.

A. You still have an elastomer.

Q. Let's compare 85 per cent styrene to 25 per cent styrene; is there a vast difference between those two products?

A. In elasticity, yes. There may not be in other properties.

Q. Isn't it a fact that in general 50 per cent styrene is considered the limit of a useful product for elasticity?

A. I don't agree with that statement.

Q. Are there some people who do agree with that statement? [282]

A. I don't know. I don't agree with it.

(Testimony of Isador Miller.)

Q. What do you call ordinary synthetic rubber?

A. Ordinary synthetic rubber is GR-S.

Q. What is the top limit of GR-S?

A. The top limit of GR-S?

Q. Yes.

A. Is known as roughly speaking 50 per cent, according to the government bulletin.

Q. Do you know of any other top limit in your vast experience?

A. I have not seen any publication which gives any other top limit.

Q. So far as you know, 50 per cent is the top limit for the GR-S?

A. As far as I have seen it in the publications.

Q. And as far as you know?

A. As far as I have seen it in publications.

Q. From your knowledge. I am asking you from your knowledge.

A. I do not know of any rubber—any GR-S higher than 50 per cent styrene.

Q. That's right. As far as you know, there is no rubber GR-S higher than with 50 per cent—

A. There is no GR-S; not rubber GR-S.

Q. I will withdraw that question. [283]

I want to clarify things; not confuse them.

As far as you know, there is no GR-S with a styrene content of higher than 50 per cent?

A. That is correct.

Q. Could it be that high styrene content means higher than 50 per cent, to distinguish these new high styrene resins from GR-S?

(Testimony of Isador Miller.)

A. Not in my opinion.

Q. I didn't hear your answer.

A. Not in my opinion.

Q. Not in your opinion? A. No, sir. [284]

* * * * *

Q. (By Mr. Halle): Do you know of any publication that sets a standard of a high standard styrene content? A. I believe so.

Q. Are you referring to the Vanderbilt book of 1948? A. I certainly am.

Q. Now, you show me the standard for high styrene content. Probably on page 45 of that exhibit.

The Clerk: That is 69.

The Witness: On page 45 of that exhibit he describes the change in properties as the styrene content of the rubbers vary, and starts off—

Q. (By Mr. Halle): Let's not use the term loosely. What are we talking about, rubber or GR-S?

I am talking about Buna S rubbers. What are you talking about?

The Court: He is reading. He is identifying the page. [285]

Q. (By Mr. Halle): I am sorry. What does it say at the top of that page?

A. It says "Effect of procedure and material on properties of GR-S."

Q. GR-S? A. That's right.

Q. Now, would you read the standard, please?

A. The standard is 71/29, given here, butadiene-styrene.

(Testimony of Isador Miller.)

Q. And that is for GR-S?

A. That is given as the standard GR-S.

Q. Now, I want to know the standard for a high styrene content of a butadiene-styrene copolymer. Does that book give such a standard?

A. It mentions one high styrene rubber.

Q. Well, it is a fact, sir, that there are butadiene-styrene copolymers that are outside of the range of GR-S, is that not a fact?

A. Not that I know of.

The Court: Did you intend to designate something else? You started to answer the question directly.

The Witness: He mentions here a 50-50 butadiene-styrene and a 65/35 butadiene-styrene.

The Court: On what page does he mention that?

The Witness: The same page, page 45 that we are talking about. [286]

Q. (By Mr. Halle): Is that what you give as a standard for a high styrene content in a copolymer?

A. No, sir. The basis of a standard is the standard GR-S, and the available rubbers above that standard are the high styrene content rubbers.

Q. Well, now, I wanted to know if you knew of a publication that set that forth in just that way, that the standard for GR-S sets the standard for what is high styrene and low styrene copolymers.

A. I cannot give you any publication.

(Testimony of Isador Miller.)

Q. There is no such publication that you know of, is there?

A. I cannot give you any such publication.

The Court: So your statement is based upon your own opinion of the known practices in the industry, is that correct?

The Witness: That is correct, your Honor.

The Clerk: There has been marked for identification, your Honor, Defendant's Exhibit L.

Q. (By Mr. Halle): Are you familiar with a publication called India Rubber World?

A. I am.

Q. Is that a standard publication of the rubber industry? [287]

A. It is a trade journal.

Q. Does it contain articles by people about rubber and synthetic rubbers?

A. From time to time.

Q. Have you ever seen an article entitled Impact Resistant Resin-Rubber Blends from the October 1948 issue of India Rubber World?

A. I don't believe I have. I may have read it, but I don't remember it.

Q. Well, it says here——

The Court: Show him the article. He couldn't remember back issues of magazines, but if he looks at them he may remember it.

The Witness: Frankly, I do not remember reading this article, but I may very well have read it.

The Court: What did you add?

The Witness: I may very well have read it.

The Court: Is it a signed article?

(Testimony of Isador Miller.)

The Witness: It is a signed article.

Q. (By Mr. Halle): By H. Sell and R. J. McCutcheon. They are from the Chemical Products Division, Goodyear Tire and Rubber Company, Akron, Ohio. Are you familiar with those gentlemen?

A. I don't know them personally. I know the company.

Q. This article is dated 1948, and it starts: [288]

"During the course of the past two years the use of high styrene copolymer resins as reinforcing and hardening agents for stocks of GR-S, natural rubber, nitrile rubber, and neoprene has gained widespread acceptance within the rubber industry."

Do you agree with that statement?

A. I would.

Q. The next sentence:

"In this classification of high styrene copolymer resins are found resins which have styrene-diolefin ratios ranging from 70 per cent styrene to under 95 per cent styrene."

Do you agree with that statement?

A. That is probably correct.

Q. In that range of 70 to 95 per cent styrene, is that anywhere near the range of GR-S, of styrene in GR-S?

A. It is much higher.

Q. I am sorry? A. It is higher.

Q. It is much higher, isn't it?

A. That's correct.

Q. I would like to show you this Whitby volume and ask you to look at page 644.

(Testimony of Isador Miller.)

Was this given a number?

The Clerk: It was not given a number, but the copyright page was read into the record. [289]

Q. (By Mr. Halle): I ask you to look at page 644 where it says Table 11, High Styrene Resins, and there are about 10 or 15 resins listed there. Some of them have the ratios of butadiene to styrene. What is the lowest ratio—what is the lowest styrene content that you can find listed there?

A. 60.

Q. And the highest?

A. I believe it is 85.

Q. So the styrene content of the copolymers listed on that table of high styrene resins range between 60 and 85 per cent styrene?

A. That is correct.

What is the date of that publication?

Q. 1954.

I believe there has been some testimony here by way of stipulation that the defendant uses a Bakelite resin TMD 2155 and that the plaintiff uses TMD 2155, as well as a Monsanto product. Were you in court when that was read off?

A. I was.

Q. Now, I ask you to look at the list of high styrene resins on page 644 of Whitby and ask you if you find either one of those resins listed.

Mr. Caughey: This book will speak for itself, it seems to me. I don't know the purpose of asking this witness.

(Testimony of Isador Miller.)

The Court: He is cross examining him as to what he [290] considers a high——

Mr. Caughey: He is asking him as to whether it is on there.

The Court: He will follow it with something else.

The Witness: Neither of those resins is described.

Q. (By Mr. Halle): Do you find that Darex No. 3 is described there?

A. That is correct.

Q. Do you also find that Darex X-34 is described there? A. Yes.

Q. What is the butadiene-styrene ratio for X-34? A. X-34 is 15/85.

Q. Do you know whether or not the Bakelite TMD 2155 and the Monsanto product that I mentioned were available to the market in 1954?

A. They were.

Q. In fact, the plaintiff's stipulation shows that they were first used in 1952?

A. That is correct. [291]

* * * * *

Redirect Examination

Q. (By Mr. Kirschstein): Is Darex Copolymer No. 3 treated as rubber in the Dewey and Almy bulletin? A. It is.

Q. And the bulletin teaches that it can be vulcanized just like a rubber? A. It does.

The Court: If you will notice, Mr. Kirschstein, if you go to paragraph 3, they kept using "resin" and "rubber" together all the time. We read only

(Testimony of Isador Miller.)

one paragraph from it. I mean that Dewey and Almy bulletin, in the second portion, the middle. In fact, they hyphenate where it says "Description."

"Darex Copolymer No. 3 is supplied as light amber-colored, spongy granules. When milled or molded into sheets, it is intermediate in hardness [292] and stiffness between the normal type of high styrene resin and a resin-rubber master batch. Since Darex Copolymer No. 3 is not a blend, but a single polymer, it is translucent, more homogeneous and has unusually high gum strength, tear resistance, resilience, and heat resistance. It is quite flexible at room temperature."

Then in the properties they call it a pure hydrocarbon.

Q. (By Mr. Kirschstein): Mr. Miller, does the description that Judge Yankwich just read indicate that this material is elastomeric?

A. It does.

Q. I believe you mentioned that there is a standard synthetic rubber in the rubber industry?

A. I did.

Q. And that you didn't believe there was such a standard in the plastic industry?

A. No, sir.

Q. So if you come across the term that requires reference to that subject, you would simply go to the rubber industry for the standard, isn't that true?

(Testimony of Isador Miller.)

Mr. Halle: I object to that as leading, your Honor.

The Court: I'm sorry. I was looking at the bulletin. [293] I didn't hear the last question.

(Question was read by the reporter.)

The Court: I think it is permissible. Go ahead.

The Witness: I would.

Q. (By Mr. Kirschstein): You mentioned that you have not brought with you and you don't recall seeing GR-S copolymers with over 50 per cent styrene. Have you seen Buna S rubbers with over 50 per cent styrene? A. I have.

Q. And GR-S is a Buna S? A. It is.

Q. You referred to a 1944 reference.

A. I gave it back to the clerk.

Q. You mentioned that reference in connection with a definition of standard GR-S.

A. I have my copy of it, Mr. Kirschstein. I don't need the exhibit copy.

Q. That reference is not the only place, to your knowledge, that the standard GR-S comes from?

A. No. It is mentioned in three other places in my testimony.

Q. How about your own knowledge?

A. From my own knowledge of the art, GR-S standard is in a definite range.

Q. And that is the general all-purpose replace for natural rubber? [294]

A. That is the general all-purpose rubber.

Mr. Kirschstein: That is all.

(Testimony of Isador Miller.)

Mr. Halle: I just have two questions, your Honor.

The Court: Go ahead.

Recross Examination

Q. (By Mr. Halle): You stated to your counsel just now that you have never heard of a GR-S of over 50 per cent, is that correct, with over 50 per cent styrene?

A. In any publication.

Q. Or you have never heard of one personally?

A. I personally have not.

Q. But you have also stated to your counsel that you know that there are Buna S's with higher than 50 per cent styrene content?

A. That is correct.

Q. So according to that there is a Buna S in existence which has a higher styrene content than any GR-S that you know of in existence, is that correct?

A. There are Buna S's with higher styrene content than 50 per cent.

Q. So that there are Buna S's with higher styrene content than there are GR-S's, is that correct?

A. I would not word that—

Q. You word it your way.

A. You worded it, Mr. Halle. I don't want to appear impertinent, but my way of saying it is there are Buna S's with a content of styrene higher than 50 per cent.

Q. And that there are no GR-S's that you know

(Testimony of Isador Miller.)

of with styrene contents of higher than 50 per cent,
is that correct? A. That is correct. [296]

* * * * *

Mr. Kirschstein: This is the plaintiff's deposition of Erich Fritsch taken February 19, 1958.

(Whereupon counsel commenced the reading of the deposition of Erich Fritsch as follows:)

DEPOSITION OF ERICH FRITSCH

"Q. Please state your full name, address, and age.

A. Erich Fritsch, 196 Cedar Street, Clinton, Massachusetts. I'm thirty-six years old.

Q. What is your occupation?

A. Executive Vice-President and General Manager of Van Brode Milling Company.

Q. Is that the plaintiff in these actions? [300]

A. That is the plaintiff.

Q. How long have you held your present position?

A. Oh, about four or five years.

Q. What was your position before that?

A. Just a plain vice-president.

Q. When did you become a plain vice-president?

A. About 1950.

Q. Are you familiar with the business of the plaintiff? A. I am.

Q. Are you familiar with their automotive business? A. I am.

Q. And with the plastic battery hold-down frames, which are the subject of this suit?

(Deposition of Erich Fritsch.)

A. I am.

Q. What are your duties generally?

A. My duties are to arrange for our company to sell merchandise, produce merchandise and make a profit. That is in general.

Q. It would be correct to say, would it not, that you generally manage the business of the plaintiff?

A. That is true.

Q. Are you familiar with the sales of plaintiff's plastic battery hold-down frames?

A. I am. [301]

Q. Since when have they been sold commercially? A. Since 1951, 1952, I think.

Q. Have they been sold continuously to date?

A. They have.

Q. Are they being sold now?

A. They are."

Mr. Kirschstein: I have a stipulation, your Honor, that becomes pertinent at this point.

The Clerk: Marked for identification, your Honor, as Plaintiff's Exhibit No. 78.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 78 for identification.)

Mr. Kirschstein: It relates to the item of evidence to be offered on which no objection will be raised, and it relates to withdrawal of certain objections raised during the examination.

The Court: If you think it is important that I read it now, I will read it now.

These are merely sales to show the commercial success?

(Deposition of Erich Fritsch.)

Mr. Caughey: Yes.

The Court: All right.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. Do you know what the total sales of these frames by plaintiff and its subsidiaries have been since they first started to sell them up until the end of the last fiscal year? A. I do.

Q. What is that amount?

A. Approximately a million and a half dollars.

Q. Have you prepared from the books of account of the plaintiff and of Van Brode Sales Co., Inc., a statement of dollar volume of sales of the plastic battery hold-down frames sold by these companies annually since they began to manufacture these frames?

A. I had such a statement prepared, yes.

Q. Would you produce it, please?

A. Yes.”

Mr. Kirschstein: The witness produced a document marked 31 on the deposition, and it is marked 30 on this trial, your Honor.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. Will you take Plaintiff’s Exhibit 31 for identification, Mr. Fritsch, and explain what the column headed ‘Date’ refers to.

A. The date gives you the times, the period of the sales for that particular year. For instance, the first item listed [303] is from June of 1951 through December of 1952, and the following years follow

(Deposition of Erich Fritsch.)

along the same line: June of 1952—I beg your pardon. This is through the fiscal year. It is June 1, 1951 through May 1, 1952, and it works on a fiscal year similar to our Government.

Q. What is the next one in that column?

A. That would be May 1, 1952 through June 1 of 1953.

Q. And the next one?

A. That would be May 1, 1953 through June 1, 1954.

Q. And the next one?

A. May 1, 1954 through June 1, 1955. I beg your pardon—that is not—There is a difference here, which I can explain. That is not through June 1, but it is through May 30. I beg your pardon, April 30.

Q. You are talking about line 6?

A. Line 6.

Q. Line 6 runs from when; what are the dates?

A. From May 1, 1954 through April 30, 1955.

Q. Why is there that difference from—

A. At this particular break-off, that date is the date that we changed from the operation of the battery hold-downs from that of Van Brode Milling Company making it, manufacturing it and selling it, to the Van Brode Milling Company now manufacturing and Van Brode Sales Company now selling.

Q. What do the figures opposite these dates on lines 1, [304] 2, 4, and 6 constitute?

(Deposition of Erich Fritsch.)

A. They are the total dollar volume of sales of battery hold-downs during the period indicated.

Q. I notice that on line 3 there is a circled figure, and on line 5 there is a circled figure, and that there are circled figures on lines 7, 8 and 9. What are those?

A. Those are returned—they are dollar value of merchandise returned and they cover returns and allowances.

Q. Are the totals referred to figures that have been obtained after subtraction of these returns?

A. That is true.

Q. What is the figure on line 11?

A. One hundred—

Q. What does it refer to?

A. It refers to the total net dollars worth of sales of battery hold-downs made when Van Brode Milling Company itself was selling the hold-downs, including the period through April 30, 1955.

Q. Beginning with June 1, 1951?

A. Beginning with June 1, 1951, correct.

Q. Would you explain lines 13, 14 and 15 under the date column?

A. From this period on the sales indicated here are the sales made by Van Brode Sales Company, and they cover the period from May 1, 1955 through—the first one is from May 1, [305] 1955 through December 31 of 1955. From now on we operate on a calendar year in the sales company.

Q. What is line 15?

A. Line 15 is the sales of Van Brode Sales Com-

(Deposition of Erich Fritsch.)

pany of battery hold-downs from January 1, 1956 through December 31, 1956.

Q. What is line 16?

A. And the last line, line 16, are the sales of battery hold-downs from January 1, 1957 through December 31, of 1957.

Q. What are the figures opposite these date entries in lines 14, 15 and 16?

A. They are the total net dollar sales of battery hold-downs during these particular periods.

Q. Are those figures after deduction of any—

A. They are net.

Q. Of any returns? A. That is correct.

Q. What is the figure on line 17, under these other figures?

A. Line 17 is the total dollar volume sales, net sales of battery hold-downs from its inception through December 31, 1957.

Q. You mean from June 1, 1951?

A. Yes, through December 31, 1957. [306]

Q. They would be the total of figures in lines 11, 14, 15 and 16; is that correct?

A. That is correct.

Q. What is this notation on the right side of the page from lines 23 to 26?

A. That is in my own writing, emphasizing again the grand total sales, net sales, of 1951 to 1957, the same figure as indicated here on this statement.

Q. Who prepared this statement?

(Deposition of Erich Fritsch.)

A. This statement was prepared by Mr. John Bailey.

Q. Who is he?

A. He is assistant to our controller. He is office manager.

Q. You directed him to prepare it?

A. I directed our controller to have it prepared, and he directed this work to be performed by his assistant."

Mr. Kirschstein: I am skipping now to page 38, beginning on line 16.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. Mr. Fritsch, do you know approximately what the battery frames that you sell, sell for wholesale? A. The average price?

Q. Yes, approximately. [307]

A. Approximately around 60 cents. I'm not sure, but from what I see, around 60 cents.

Q. Can you estimate on this basis about how many frames have been sold by plaintiff up until the end of the last fiscal year from the beginning?

A. Well, over 3,000,000 pieces, I would say.

Q. I notice that in 1955 there is a large growth in your sales. A. That is correct.

Q. Can you explain that?

A. Our 12-volt battery hold-downs came out about that time, and the sales of the 12-volt battery together with the 6-volt increased the sales of our entire line of hold-downs."

(Deposition of Erich Fritsch.)

Mr. Kirschstein: I am skipping to page 41, beginning with line 12.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. Through what channels does plaintiff distribute its frames?

A. We distribute our——”

Mr. Kirschstein: There is an objection there.

Mr. Halle: I am going to object to that last answer, “We think it was,” as being the operation of the witness’ mind [308] rather than any evidence that he has given.

Mr. Kirschstein: Excuse me, your Honor. The answer wasn’t read in yet. It is my mistake. That answer wasn’t read.

I will start further down on the page.

The Court: All right.

Mr. Kirschstein: I am starting with line 18—I am sorry, your Honor. I am skipping to page 42, and am starting with the third to the last line.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. What channels are the plaintiff’s frames distributed through?

A. Our hold-downs are—our battery hold-downs are sold by automotive distributors and chains.

Q. Are these sales nationwide?

A. They are nationwide.

Q. Do they include the State of California?

A. It includes the State of California.

(Deposition of Erich Fritsch.)

Mr. Kirschstein: Please mark this box as Plaintiff's Exhibit 32 for identification."

The Clerk: That is our 31 in the trial exhibits, Plaintiff's 31. [309]

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. I show you Plaintiff's Exhibit 32 for identification and ask you if you know what it is.

A. Yes, it is our box.

Q. What box?

A. It is our—it is the type of box that we use to package our battery hold-downs.

Q. Except for size, are all of your battery hold-down frames that are sold in boxes, sold in containers like this?

A. With one exception, yes.

Q. What is the exception?

A. We sell our frames to Wizard, Western Auto, in their box; but any of the hold-downs that we sell in our box, this is the box we have always used.

Q. This is the only box, except for size?

A. Except for size.

Q. Would you open the box, sir? A. Yes.

Mr. Kirschstein: Let the record show that the witness opened the box and took an object out of it.

Q. Hand me the object that you just took out of the box, Mr. Fritsch.

A. Yes (handing object to Mr. Kirschstein).

Mr. Kirschstein: Please mark this as Plaintiff's [310] Exhibit No. 33 for identification."

(Deposition of Erich Fritsch.)

The Clerk: It was marked in our numbering as No. 32, Plaintiff's 32.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. I show you Plaintiff's Exhibit No. 33 for identification, and ask you what it is.

A. It is the Van Brode battery hold-down.

Q. What color is that frame?

A. The color is red.

Q. Have they always been red?

A. All the hold-downs that we ever sold for batteries were red.

Q. How long has the particular red color, which this frame has, been present on your frames?

A. At least since 1952.

Q. On all of the frames?

A. On all the frames that we sold commercially.

Q. That you sold commercially?

A. Yes.

Q. Before then, were your frames red, also?

A. They were red.

Q. There was a slightly different shade?

A. I understand there was a different shade of red. [311]

Q. Do you advertise your frames?

A. We do.

Q. What type of advertising do you do?

A. We advertise our battery hold-downs in trade journals.

Q. About how much has been your total advertising of your frames since inception?

(Deposition of Erich Fritsch.)

A. About \$6,000. I have the exact figure, if you want it, but it is about \$6,000.

Q. Have you brought here typical examples or samples of your advertising?

A. I have. I think you have them now. They are in the scrap book, I suppose."

Mr. Kirschstein: I am skipping down to the sixth line from the bottom of the page.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. You certainly wouldn't have advertised these frames much more than \$6,000 worth, would you? A. No."

Mr. Halle: I object to both the question and the answer and move it be stricken.

Mr. Caughey: The objection was withdrawn according to the stipulation, I believe. [312]

Mr. Halle: This is asking him what he certainly would or wouldn't have done. You have your stipulation there. What he would do about something about advertising has nothing to do with it.

The Court: It is an argumentative question. He has already stated it is about \$6,000. The proportion of advertising to sales doesn't mean anything. Some articles sell themselves. I will sustain the objection.

Unless it has been waived, I will sustain the objection to the question because it is argumentative. He has already stated what the amount is.

Go ahead.

Sometimes advertising is out of proportion to the

(Deposition of Erich Fritsch.)

result. We had an illustration of that in the Looz case. More than half of the income was spent in plugging the item on the air. But it doesn't make much difference one way or the other. Sometimes a product sells itself once it is established.

All right. Let's go to the next matter.

Mr. Kirschstein: Your Honor, on pages 46 through 48 are marked Exhibits 34-A through H on the deposition, which are 33 through 40 of this trial.

I am starting again at page 49, line 12.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. In Plaintiff's Exhibit 34-A for identification, what [313] page is the advertisement on?

A. Page 146.

Q. In Plaintiff's Exhibit 34-G, what page is the advertisement on? A. On page 132.

Q. In Plaintiff's Exhibit 34-B, what page is the advertisement on? A. Page 107.

Q. Now, the exhibits I just showed you, Plaintiff's Exhibits 34-A, B, and G, are trade journal advertisements, aren't they? A. Correct.

Q. How are advertisements such as Exhibit 34-H distributed?

A. Exhibit H is what they would call a flyer and they are either sent on request or we may mail them to a customer that has bought our battery hold-downs. How is it used? It is pasted on a window of a place where it is being sold. Usually we hope it would get into the retail channel.

.

(Deposition of Erich Fritsch.)

Q. What type of publications are Exhibits A, B, and G?

A. They are trade publications.

Q. The automotive trade?

A. Automotive trade publications.

Q. What is Exhibit 34-E?

A. That is another trade publication. [314]

Q. What is the exhibit?

A. It is a proof of an advertisement that was going to appear in the March 1955 issue of the Southern Automotive Journal.

Q. What is Plaintiff's Exhibit 34-C?

A. Exhibit 34-C is a proof of an advertisement that appeared in Jobber Topics, the October 1956 edition.

Q. What is Exhibit 34-F?

A. This is a full-page torn from the Automotive News issue of March 21, 1955, where our ad appears."

Mr. Kirschstein: On the rest of the page of this deposition, your Honor, page 51, another exhibit was marked as 35 on the deposition, and it is 41 on the trial.

Now, starting at page 52:

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. Mr. Fritsch, I show you Plaintiff's Exhibit 35 for identification, and ask you if you know what it is.

A. Yes, I'm familiar with this book.

Q. What is it?

(Deposition of Erich Fritsch.)

A. It is a scrapbook maintained by Sid Coleman showing price lists, catalogue sheets and what-have-you, of merchandise that is handled through the Automotive Department.

Mr. Halle: Why don't you number the pages?

Mr. Kirschstein: All right, we will do it right now. [315]

Let the record show that at Mr. Halle's suggestion I am numbering the pages beginning with the inside of the front cover."

Mr. Kirschstein: Your Honor, the defendant will agree we can skip the next few pages where the witness identified all of the items on these pages.

The Court: They have already been given a number here.

Mr. Kirschstein: On the numbered pages, your Honor, I think they speak for themselves, but I will read them if the defendant wants it.

Mr. Halle: You don't have to read it.

Mr. Kirschstein: So I am skipping to page 57, line 10.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. Do the plastic battery hold-down frames manufactured by the plaintiff and sold by the plaintiff or its subsidiary, Van Brode Sales Company, Inc., bear a patent notice? A. They do.

Q. I show you plaintiff's Exhibit 33 for identification and ask you if you can find that notice.

A. Yes.

Q. Would you read it?

(Deposition of Erich Fritsch.)

A. It says, 'U. S. Patent No. 2710660.'

Q. When did the plaintiff start putting that notice on? [316]

A. After we were issued, were assigned the patent that was issued to Mr. Coleman.

Q. After the patent was issued?

A. Issued.

Q. And has it always been on ever since?

A. As far as I know it has.

Q. On all the models?

A. As far as I know it has.

Mr. Kirschstein: That is all."

* * * * *

The Clerk: The defendant has marked for identification their Exhibits Q and R.

(The exhibits referred to were marked Defendant's Exhibits Q and R for identification.)

Mr. Halle: Now, your Honor, as part of the deposition of Mr. Fritsch that was just read there was a statement made in answer to a question, that the plaintiff always packs their frame in a box, and your Honor has seen the plaintiff's box, and then at one point Mr. Fritsch said "with one exception." [317] And what is the exception? He said, "We sell our frames to Wizard, Western Auto, in their box; but any of the hold-downs that we sell in our box, this is the box we have always used."

Now, I have obtained a box of the Western Auto Company showing their trademark "Wizard" on it, with a Van Brode frame packed in it, and I

(Deposition of Erich Fritsch.)

am going to offer this in evidence, with the consent of the plaintiff herein, showing that product that Mr. Fritsch was referring to as the Van Brode frame packed by the Western Auto Company.

The Court: All right.

The Clerk: Q and R in evidence.

(The exhibits heretofore marked Defendant's Exhibits Q and R were received in evidence.)

Mr. Halle: Cross examination. I am reading from page 58 at the middle of the page.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. (By Mr. Halle): You do not do any advertising with the consumer public, is that right?

A. We do not do any consumer advertising.

Q. Mr. Fritsch, you have in your lap a ledger which you brought as supporting evidence to some of the figures that were presented in Exhibit 31.

A. Yes.

Q. Can you determine from that ledger the date of the first sale of a plastic battery hold-down by your company?

A. Yes.

Q. What is that date?

A. It shows a sale—I can't understand why—it is a sale of only \$2.66 on October 28, 1951. The first real sale, or of any money was January 6, 1952.

Q. What was the amount of that sale?

A. \$7,974.96.

(Deposition of Erich Fritsch.)

Q. Would you know offhand who that sale was to?

A. This is a ledger. Therefore, it would be summary of individual sales. There would be a bunch of documents to support this. That was the first entry they made.

Q. That would reflect——

A. An accumulated number of sales.

Q. For that period of a week or ten days, beforehand? A. I assume so, yes.

Q. So, roughly, it would be January 1, 1952, when any substantial sales were first made?

A. It would appear so from this book, yes.

Q. This sale of \$2.66 in October may have been some kind of a sample?

A. I don't know.

Q. Could it be possible that the sale of \$2.66 in October [319] was made for the purposes of getting a trademark registration on the product?

Mr. Kirschstein: Objected to, and I direct the witness not to answer. My objection is on the grounds of irrelevancy and immateriality.

Q. Do I understand that Mr. Sidney Coleman and his associates promote this plastic battery hold-down frame for you?

A. What do you mean by the word 'promote'?

Q. Are they in charge of the sales?

A. Yes.

Q. And representing you with all of your customers?

A. On the battery hold-downs, yes.

(Deposition of Erich Fritsch.)

Q. Do you pay Mr. Coleman and his associates approximately $2\frac{1}{2}$ per cent of your sales price for their share in handling the sales?

A. I pay Mr. Coleman $2\frac{1}{2}$ per cent. I pay a different rate to his representatives, probably higher." [320]

* * * * *

"Q. What is the total cost to you per dollar volume of sales for your sales cost?

A. I really don't know the exact percentage. I think it is under 10 per cent, total sales cost.

Q. In other words, approximately, for every dollar's worth of battery hold-down frames that you sell, they cost your company 10 cents for the services of Mr. Coleman and his associates?

A. No, I didn't say that. I said for every dollar that you sell, 10 cents on the dollar is actually your sales expense, made up of advertising, of which you have \$6,000, telephone calls, show expenses—appearing at the shows—postage, stenography services, use of our stationery—the whole works.

Q. Then, for a million and a half dollars worth of sales, [322] the cost of those sales would be approximately \$150,000, and would not exceed 10 per cent——

A. If that is \$150,000, true."

Mr. Halle: I am going to skip to the bottom of page 62, next to the last question from the bottom.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. The first battery hold-down frame that your

(Deposition of Erich Fritsch.)

company made had triangular reinforcements at the corners; is that correct?

A. I don't know for sure, but I think so.

Q. I hand you Exhibit 33 for identification. You will note that there are no triangular reinforcements at the corners; is that correct?

A. That is correct.

Q. When did your company make the first model battery hold-down frame similar to Exhibit 33, without the triangular reinforcements?

A. I don't know.

Q. Was it at or about the time that the 12-volt storage batteries came out?

A. I would think so.

Q. Would that be in the year 1955?

A. Without looking at the price lists and so forth, I'm not sure of that, but I would have to assume that. You see, [323] this is a detail that I wouldn't pay attention to.

Q. After you made the model without the triangular reinforcements for the 12-volt batteries, did you also make a similar model without the triangular reinforcements for the 6-volt batteries?

A. I don't know.

Q. I show you Exhibit 32, which is the package for the frame——

A. Yes.

Q. (Continuing) ——and I ask you whether it is the custom of your company to ship battery frames in packages such as that.

A. For most of our business, yes.

(Deposition of Erich Fritsch.)

Q. And you also ship to a company that you call Wizard?

A. That is Western Auto, yes.

Q. And they have their own boxes?

A. They have their own box.

Q. And you are making no claim with reference to the defendants here in connection with those Wizard boxes, are you? A. No, sir.

Q. With the exception of the Wizard boxes, did you ever ship frames without being packaged?

A. Yes.

Q. Who do you ship those frames to?

A. To another company that boxes it themselves. [324]

Q. I would like to restrict it to the unfair competition aspect of this case. Do you ship any frames of your own with which you claim the defendant Kravex competes unfairly where you don't ship those frames packaged in a box such as Exhibit 32?

A. I'm afraid I might have lost you on that.

Mr. Halle: I will withdraw the question.

Q. You have mentioned two companies that you ship frames to without packages. Are there any other companies? A. Not that I know of.

Q. In other words, as far as you know all other frames shipped by your company are packaged in a box similar to Exhibit 32? A. True.

Q. And as far as you know, the frames arrive at your customer's premises packaged in such a box? A. True."

(Deposition of Erich Fritsch.)

Mr. Halle: I skip now to page 69, the second question from the top of the page.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. Do you personally know of any instance where the defendant, Cox Air Gauge Systems, Inc. sold a red plastic battery hold-down frame of a manufacture other than yours for [325] one of your frames?

A. I do not know of it personally, no.

Q. Do you have any reports that were made to your company that such a thing ever happened?

A. Repeat the question again.

(The reporter read the last question as recorded.)

A. You mean——

Mr. Halle: I will withdraw the question.

Q. Have any complaints ever been made to your company that Cox Air Gauge Systems, Inc. sold a red plastic battery frame that was not of your manufacture when they were specifically asked for your battery frame, your Kant-Ker-Rode battery frame?

A. I don't know of any instance, no.”

Mr. Halle: I skip now to page 71. Pardon me. Page 70 at the bottom of the page.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. In other words, any complaint you may have had would have been through Mr. Coleman?

A. Yes, the manufacturers' representatives.

(Deposition of Erich Fritsch.)

Q. Or his representatives?

A. That is right.

Q. Would you say that Mr. Coleman is the central link [326] in your sales organization in communications from you to your customers and representatives? A. Yes, sir."

Mr. Halle: At the bottom of page 71:

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. You mentioned that since 1952 your frames were made of a certain red shade of which Exhibit 33 is an example. A. Yes, sir.

Q. Do you have any arrangement with anyone to produce that red shade for you?

A. What do you mean by 'arrangement,' Mr. Halle?

Q. I believe there are two companies that supply you with molding powder for that frame, Monsanto and Bakelite. A. True.

Q. Do you have any arrangement with either of those companies to reserve that particular shade of red for your company?

A. I don't know of any.

Q. I notice that in Exhibit 35 we have a flyer on page 12, and also a flyer on page 25, which appear to be the same. Are those the same flyers?

A. Could be. I have no way of knowing without looking, the same way you are. I thought that some of the stuff here [327] was repetitious. There is no date on either one, and they seem to be the same."

Mr. Halle: On page 74, the first question:

(Deposition of Erich Fritsch.)

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. Do you know when this flyer, which is represented on either page 12 or page 25 of Exhibit 35, was put out?

A. I don't know, except if we can tie it in with a price list. That is the only way I would know.”

Mr. Halle: I skip now to page 75, the first question.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. Maybe we can get it a little more definitely by looking at the flyer itself. It says, ‘Patent No. 2710660’ on the flyer itself at page 25, and also on the flyer on page 12; is that correct?

A. Yes.

Q. And I understand your patent with that number was issued on June 14, 1955. A. Yes.

Q. So that means that these two flyers on pages 12 and 25 must have been used in a promotion some date after June 14, 1955. [328] A. True.

Q. Would you explain how that promotion worked.

A. Well, this particular catalogue sheet was directed—this is where we made an attempt and a rather successful attempt to have the gasoline stations know about our hold-down, because that was the link that was very, very important to make. We could go out and sell our hold-down to a jobber. Now, to make the jobbers sell it to the retailer who, in turn, would sell it to the consumer, was

(Deposition of Erich Fritsch.)

always a problem in any line of endeavor. This was an attempt to give something to the retailer, the gasoline station, the garage man, so that he would stock our hold-downs, and this was a promotion designed for him wherein he could get this particular set of tools free by buying a 711 assortment, which consists maybe of about fifteen numbers. I don't know offhand. We'd have to look that up. These tools, being of such a nature, that he would use them in repairing batteries. They are unique tools to remove the cables from the battery, and so forth. This was sent to the retailer."

Mr. Halle: I skip to the next question after that.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. Do you know how much that set of tools cost that was given as a premium? [329]

A. The set of tools cost about three dollars, I believe, and we didn't pay for the tools altogether.

Q. Who paid for that?

A. The jobber himself pays for most of the cost.

Q. The jobber would be your customer?

A. The jobber, he's bearing most of the load of that. I think we paid 50 cents, or something, of the set."

Mr. Halle: At the middle of the page there:

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. Would you say, then, that approximately three dollars' worth of tools were given away, then,

(Deposition of Erich Fritsch.)

with an order of approximately \$20 worth of merchandise? A. Yes.

Q. And the cost of the three dollars was not borne by the plaintiff? A. Not entirely.

Q. How much did the plaintiff bear of the cost?

A. Not knowing offhand—but between two dollars and two dollars and fifty cents was borne by the jobber. We bore either fifty cents or a dollar.

Q. The price that the jobber paid didn't come into your cost of sales, which we talked about before? A. No, that is right." [330]

* * * * *

Mr. Kirschstein: Page 72, starting at the second to last question:

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. Now, your product is sold to the automotive trade. A. True.

Q. Do you sell to anybody else besides the automotive trade? A. Yes.

Q. Did you mention chains?

A. That is the automotive trade.

Q. Who else do you sell to?

A. We sell to marine users; in other words, people who have boats. They have a very bad corrosion problem. We sell to tractor manufacturers, who manufacture tractors, original equipment.

Q. Would you say that the bulk of your product is sold to the automotive trade? A. Sure.

Mr. Kirschstein: You sell the frame as original equipment on tractors? [331]

(Deposition of Erich Fritsch.)

The Witness: Yes, sir.

Mr. Kirschstein: Your frames, you mean?

The Witness: Our frames, Kant-Ker-Rode.

Q. Which tractor company?

A. That, offhand, I can't tell you. I'll find that out.

Q. It is not to all companies? A. No.

Q. One of the companies?

A. One or two, or possibly three." [332]

* * * * *

The Court: Gentlemen, this is the third time very recently that I have had to refer to the fact that in the law on the patents we are not governed by the tyranny of words.

I dug up that old statement that the patentee may write his own dictionary. In other words, he may use words in a certain manner that are understandable in the light of what he describes, then the fact that he calls it one thing rather than another doesn't matter.

We had that illustration in the Everlube case where the problem arose whether a certain combination was thermoplastic or thermosetting. We had it also in another case. No. In the same case we had the question whether a [339] combination of elements constituted truly an emulsion or not.

In a more recent case I also made similar observations.

I think the question presented by the motion is one that should be determined also as a question of fact.

I think this patent is very limited. A study of

the file wrapper demonstrates it. Because it is inconceivable that the patentee should have acquired a monopoly on any combination of any use of plastics.

The best truth of it is this: That his entire patent based upon the idea of the use of plastic, without designating a particular kind of plastic, were cancelled out, and on appeal to the board the board sustained the examiner, and then they allowed him, under the rule, to modify his claims. In his modification of claims he sought to introduce what are now the four claims, in addition to the other four, and the examiner rejected the claims and renumbered them. He wanted those in addition to the claims he rejected, claims 1 and 2, which would have claimed the entire field.

So we are back to Mr. Joyce's case where this patentee has been given a very limited patent to a frame made of certain types of plastic, and that is all he has. He cannot recapture claims 1 and 2, which would have given him the entire field. Because it would be absurd to think that the Patent Office would in this era of plastics give a man a patent upon the use of plastic in a thing like this, just a [340] frame, which is so simple a mechanism that I doubt if anybody has any patent upon the idea. Because clamping a thing down is not a patentable device.

You can clamp a thing down by making it work as a vise.

So the original claims were rejected. What he wanted was to cover the entire field, which would

have eliminated the use of plastic by anyone else.

So when he comes back it is very significant—I studied this file wrapper very carefully, and when Mr. Herzog tried to recapture, retain 1 and 2, plus the 4, this is the argument he used, which of course was rejected. But he himself realized that he was modifying the proposed claims.

“The board held the original claims unpatentable not in view of the references of record, but because they set forth merely the desired properties of the plastic and in no way recited the composition of the plastic. This defect having now been cured, the claims should be allowed, and accordingly a Notice of Allowance is respectfully requested.”

You see, he renumbered his claims, and in addition to the others he asked that he be allowed to present four claims in addition to the others. The examiner rejected, stood by the original order rejecting the original claims, and gave him merely the limited four claims which describe a frame [341] consisting of a certain type of plastic.

So in the light of that we have, as I say, a very limited patent consisting of a hold-down frame; not the frame itself, because that is evidently in the public domain, but the making of it with a particular plastic.

And it is very significant that the allowance of the claim is not as requested, but the notice of allowance states “battery hold-down frame of synthetic rubber-resin material as amended by examiner.”

And the amendment by the examiner consisted of

renumbering them 1, 2, 3 and 4, instead of 2, 3, 4, 5 and 6, and adding them to the others. Because the examiner again rejected the claim to the entire field.

So I believe with that statement I will deny the motion and I will put you upon such additional proof as you desire to present.

Mr. Halle: Your Honor, I would like to call Mr. Raymond B. Stringfield to take the stand as our witness.

The Court: All right.

RAYMOND B. STRINGFIELD

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name.

The Witness: Raymond B. Stringfield.

The Clerk: S-t-r-i-n-g-f-i-e-l-d. [342]

The Witness: That's right.

The Clerk: Thank you.

Direct Examination

Q. (By Mr. Halle): Mr. Stringfield, what is your business?

A. I am a consulting chemical engineer, and also president of Fullerton Manufacturing Company of Fullerton, California.

Q. Would you state your past experience, particularly with reference to chemicals and plastics, and such experience as you may have had in the molding of plastics.

A. I am a graduate in chemistry of the Univer-

(Testimony of Raymond B. Stringfield.)

sity of Southern California, in 1913; a graduate in chemical engineering from the Massachusetts Institute of Technology in 1915. After some five years commercial experience I went in the rubber industry in 1920 and spent nine years with the Goodyear Tire & Rubber Company, some five years as manager of service laboratories and process development in Akron at their main plant, and the remainder of the time as chief chemist of the Goodyear plant in Los Angeles.

After leaving them I entered the consulting practice, and since 1929 have been a consulting chemical engineer specializing in rubber and plastics, and at the same time have had a finger in several different enterprises.

From 1930 to '35 I was connected with a plastic [343] molding plant, in fact my connection with plastics began in 1929, at which time the only plastics available were thermosetting materials, and has continued in close connection ever since.

From 1932 to 1944 I was part time on the faculty of the University of Southern California in the Chemical Engineering Department, and in connection with that work they asked me each year to give a course in the evening in chemistry of synthetic resins, and also a second course in rubber technology, which were given during that period.

During the war I was staff process engineer for Consolidated Vultee Aircraft Corporation, and was also chairman of the board of Reeves Rubber, Incorporated, San Clemente, California, and at the

(Testimony of Raymond B. Stringfield.)

end of the war in 1946 a group of us purchased a plant, and I have been president of Fullerton Manufacturing Company, Fullerton, California, a rubber molding plant, since that time, but also devoting a portion of my time to consulting practice.

The Court: What products does Fullerton Manufacturing Company make?

The Witness: Fullerton Manufacturing Company is primarily a rubber molding plant making custom molded rubber goods, about 60 per cent rubber parts for the oil tool industry. We also have a plastics department which does plastic extrusion.

The Court: All right. [344]

The Witness: Incidentally, over the years I have been a member of a number of technical societies and have been chairman of the Southern California section of the American Chemical Society, the American Institute of Chemical Engineers, the American Society for Testing Materials, and was organizer and first chairman of the Los Angeles Rubber Group, which is the technical society of the rubber industry; and I am a registered chemical engineer in California, No. 27.

The Court: All right.

Didn't you testify in a case last year in this court?

The Witness: Yes.

The Court: Which case was that?

The Witness: That was in the Reading Tire case.

The Court: I thought your name and background sounded familiar.

(Testimony of Raymond B. Stringfield.)

All right.

Q. (By Mr. Halle): Mr. Stringfield, could you define a Buna S for us?

A. Buna S today is almost an obsolete term. It was originated during World War I to designate the synthetic rubbers that were made in Germany by the copolymerization of butadiene and styrene with a sodium catalyst.

It is carried over and is used sometimes since that [345] time, but it is practically obsolete at the moment. It simply designates a copolymer of butadiene and styrene made with a sodium catalyst, which the catalyst is no longer used in normal practice.

The Clerk: There has been marked for identification, your Honor, Defendant's Exhibit S.

(The exhibit referred to was marked Defendant's Exhibit S for identification.)

Mr. Halle: I am going to offer this exhibit, which is contained in an envelope, Exhibit S. I am going to offer it in evidence right now.

These are the Bakelite molding material pamphlets.

The Clerk: May it be received, your Honor?

The Court: What did you identify it as? What did you say it was?

Mr. Halle: The Bakelite Company material on molding TMD 2155, and concerning material.

The Court: All right.

(The exhibit heretofore marked Defendant's Exhibit S was received in evidence.)

(Testimony of Raymond B. Stringfield.)

Q. (By Mr. Halle): Mr. Stringfield, is there a product in the industry today known as a high impact plastic?

A. High impact plastic? Yes.

The high impact styrenes come under that term. That term as such is not used particularly, but high impact styrene [346] would be a high impact plastic.

Q. What are the properties of a high impact styrene?

A. The impact strength of polystyrene has been greatly increased by modification of the original polystyrene by various additives or copolymers to produce a product capable of being molded and having much greater strength than the original polystyrene did.

Q. Is it well known in the trade today that you can modify polystyrene with a copolymer such as one of butadiene and styrene?

A. Yes, there are several commercial molding compounds on the market.

Q. Do you have a publication which lists some of these compounds that you are talking about?

A. Yes. The book *Synthetic Rubber*, which is actually a publication sponsored by the Division of Rubber Chemistry of the American Chemical Society, with Dr. G. S. Whitby, editor in chief, published in 1954, lists on page 644 commercial brands of high styrene resins and related materials produced commercially, and gives a matter of 29 different compounds in that classification.

(Testimony of Raymond B. Stringfield.)

Q. That is table XI?

A. Table XI, high styrene resins.

Q. Will you turn to page 632 of Whitby and would you read that chapter starting "Properties of High-Styrene Resin"? [347]

A. There is a paragraph on page 632 titled "Properties of High-Styrene Resins."

"The properties of high-styrene resins depend in large measure on the ratio of styrene to butadiene employed in their manufacture. A polymer containing equal amounts by weight of the two monomers appears to be a rubber at room temperature, although certain characteristics in its cured stocks, such as resilience, heat buildup, and low-temperature flexibility, are much poorer than in more truly rubberlike polymers, such as GR-S. As the proportion of styrene increases and that of butadiene decreases, the polymer becomes stiffer, less extensible, and harder, thus approaching the properties of polystyrene. If films are cast from latexes of various butadiene-styrene copolymers, it is found that the polymer must contain at least 25 to 30 per cent butadiene, to obtain a continuous film on drying at room temperature. Copolymers containing small proportions of butadiene (10 to 15 per cent) have the physical appearance of polystyrene but are less soluble and less brittle and have lower softening points. Other differences will be noted in a discussion of applications of these new resins. D'Tanni, Hess, and Mast have reported the latex and solid

(Testimony of Raymond B. Stringfield.)

polymer properties of a series of resins containing more than 50 per cent styrene." [348]

Q. Would you read the next paragraph, too, Mr. Stringfield.

A. "Storey and H. L. Williams studied, not only a series of butadiene-styrene copolymers having various monomer ratios up to ratios representing high-styrene resins, but also blends of these copolymers themselves and blends of them with GR-S. They found that beyond a styrene content of 50 per cent there occurred on vulcanization a fall in tensile strength and ultimate elongation and an increase in modulus. A copolymer from a 30/70 butadiene-styrene charge could not be flexed, and from a 20/80 charge the product resembled ebony. Latex blends of such polymers exhibited properties at least as good as those of blends made on a mill. The properties of blends were determined primarily by the total styrene content of the blend rather than by the composition of the specific copolymers blended."

Q. Mr. Stringfield, do you agree with the statements made in Whitby?

A. Yes, those are correct.

Q. Could you tell us when a copolymer such as a copolymer of butadiene and styrene is varied—when the styrene content is varied from, let's say, 99 per cent [349] butadiene to 1 per cent styrene away up to 1 per cent butadiene and 99 per cent styrene—could you tell us whether there is a gen-

(Testimony of Raymond B. Stringfield.)

eral point at which it ceases to be a rubbery material and becomes more of a resinous material?

A. There is no sharp point at which that occurs. As the styrene content is increased the material becomes stiffer, and the application of the low styrene materials are in the rubber range. Their first introduction, of course, being as synthetic rubbers, and the development of the synthetic rubbers included studies of the entire range of composition.

The GR-S that was settled upon was settled upon as a matter of a combination of properties that was desirable from a rubber standpoint which included the considerations of vulcanization. And in the range immediately above that, on up to 40 and 50 per cent, you have products which are vulcanizable but which become stiffer and have less elongation. So for most purposes they are not as suitable for rubbers, although the GR-S latex containing some 40 or 43 per cent styrene has been used extensively as a binder for papers and as backing for cloth, and things of that sort. But as the styrene content increases above 50 per cent, although there is no sharp dividing line, you are getting into a resin classification where the material is being used for its stiffening effect primarily, rather than for any vulcanization considerations, and that has led to the use of the high [350] styrene polymers containing 70 to 85 per cent of styrene for such purposes as the blending with rubber for shoe soles and for belt coverings, and for many purposes where a stiff composition is used, and in recent years has led to

(Testimony of Raymond B. Stringfield.)

their use as blends with polystyrene to greatly increase its impact resistance.

There enters into the picture, again, the fact that polystyrene is far different from GR-S rubber, or natural rubber, and inasmuch as vulcanization considerations were not indicated, a study of the range of properties that would be obtained with different percentages of styrene has led more recently to the development of high impact materials using lower percentages of styrene than were originally used for blends. And these have been found to be commercially satisfactory in their handling on molding equipment.

The Court: So that because of this change in resistance this synthetic material could be called a rubber resin, although it would be a contradiction in terms ordinarily?

The Witness: Yes, it is a rather loose term with no definite end point either way. The higher ones are very resinous, and the lower styrene contents are very rubbery.

In the early period of this, in the '46, '47, '48, there were practically only the two extremes, the GR-S at one end being rubbery and having 25 per cent styrene, actually—it actually ended up 23½ per cent due to not all the [351] styrene being polymerized and the excess being steamed out—and the first of the high styrene copolymers, which was Goodyear's pliolite S-3, which contained 85 per cent styrene and which was used for its stiffening purposes. And during those years the whole picture

(Testimony of Raymond B. Stringfield.)

was under Government control and there was very little work being done outside of the development laboratories on the intermediate ranges.

Q. Professor, would you state the range of styrene content in a high styrene butadiene-styrene copolymer?

A. I would consider that from 50 per cent up would be a high styrene butadiene copolymer, and from 50 per cent down would be a rubbery styrene copolymer, because of the fact that while there is no sharp break-off point there, the materials in the 40 to 50 per cent range have been used as rubbers, and I do not know of any such use in the ranges above that.

Q. Would you classify the range below 50 per cent as a low styrene content copolymer?

A. Yes, sir, I think that would be correct.

Q. And above 50 per cent as a high styrene content?

A. Yes, sir, I think that would be correct.

The Court: With that description, the low styrene content would result in a material that retains some of the qualities of rubber, is that correct?

The Witness: The copolymer itself is quite [352] rubbery, and introduced into rubber does not have the stiffening effect that is wanted in the uses that they use the high polymers.

The Clerk: There has been marked for identification Defendant's Exhibit T.

(The exhibit referred to was marked Defendant's Exhibit T for identification.)

(Testimony of Raymond B. Stringfield.)

Mr. Halle: I now offer Defendant's Exhibit T in evidence, your Honor. It is some pages photostated from the 1950 edition of the Modern Plastics Encyclopedia and Engineers Handbook, and it was published on or about June 16, 1950.

The Court: All right. It may be received.

(The exhibit heretofore marked Defendant's Exhibit T was received in evidence.) [353]

Q. (By Mr. Halle): I hand you these pages, Exhibit T in evidence, and I ask you whether you have had a chance to study this article entitled Styrene Polymers and Copolymers?

A. Yes, sir. I have read the article.

Q. Do you agree with the statements made in that article?

A. I think in general I would agree with them.

Q. Now, I ask you to look at page 754 and start reading from the last paragraph on that page.

A. "A new styrene-base copolymer was announced during 1949, which offers impact strength in the cellulosic range, plus excellent dimensional stability due to its low water absorption and the absence of plasticizers. Of particular note is its resistance to battery acids and gasolines. Initial applications have included battery cases and parts, housings for business machines and electrical appliances, tool handles, and vacuum cleaner parts.

"Another high styrene-butadiene copolymer has been blended with polystyrene to give tough, fairly transparent blends. The compounds are best made by mixing the resin and pigments on a heated mill

(Testimony of Raymond B. Stringfield.)

or internal mixer, although fairly good results have been obtained by simply blending the powdered resin with colored polystyrene molding pellets in a tumbling [354] drum just prior to injection molding. The company points out that polystyrene in such a combination contributes low cost, surface hardness, and glossy finish while the high styrene-butadiene copolymer gives higher elongation, impact strength, and good mold flow."

Q. Is there a footnote there that shows what product is being spoken about there?

Mr. Kirschstein: I object to that.

A. Yes.

Mr. Kirschstein: There were two products being spoken of.

The Court: It speaks for itself.

The Witness: In the second paragraph the high styrene-butadiene copolymer that has high impact strength is noted as Darex copolymer X-34, Dewey & Almy Chemical Company.

Q. (By Mr. Halle): Do you know what the styrene content in Darex X-34 is?

A. That is 85 per cent, according to the Dewey and Almy literature.

Q. And Darex No. 3 has a 70 per cent?

A. 70 per cent.

Q. This publication that you just read from, *Modern Plastics Encyclopedia and Engineers Handbook*, is this a [355] standard reference work in the plastics industry?

A. Yes. That is put out by the same company

(Testimony of Raymond B. Stringfield.)

which put out Modern Plastics, the magazine, and is an annual publication that summarizes developments of the year and tabulates the data of the industry and is widely accepted.

Q. I hand you Plaintiff's Exhibit 1 in evidence, which is a copy of the suit patent, and ask you whether you have had an opportunity to study that?

A. Yes, I have.

Q. I hand you, again, Defendant's Exhibit T in evidence, and with particular reference to that paragraph that you read about the high styrene-butadiene copolymer, which has been blended with polystyrene to give tough blends, and I ask you whether there is anything in Plaintiff's Exhibit 1, the suit patent, that teaches anything more than is said in that article?

A. As far as I have been able to find there is nothing in the suit patent which teaches anything more than that, because they give no percentage compositions, no direction for making the molding powder, any more than is given in that article.

The Court: When you are speaking of the patent, you are talking about the entire patent?

The Witness: Yes, that is correct.

The Court: The specifications and not merely the claims? [356]

The Witness: That's right.

The patent simply states that they add their Darex copolymer No. 3 to polystyrene and get a molded article with improved building strength, toughness and flexibility.

(Testimony of Raymond B. Stringfield.)

Q. (By Mr. Halle): Are there any molding instructions given in the specification of the patent?

A. No, there are no mixing instructions or molding instructions.

Q. And it is a fact——

A. And no percentage composition.

Q. It is a fact that no information is given other than the fact that they mix polystyrene with Darex No. 3 to get certain desired qualities?

A. That is correct.

The Court: Would a person from the use of this compound, copolymer, draw any inference as to percentages?

The Witness: No, I don't believe so. The patent doesn't give any percentages, and the article in the Modern Plastics catalog does not give any percentages. Anyone wishing to compound a compound of that type would have to experiment with various proportions of the polymer and also develop mixing methods for satisfactorily accomplishing the result. Even if he is skilled in the art that would involve quite a considerable amount of experimentation and testing to [357] develop a product that would answer the purpose.

The Court: In column 2, line 71, this appears:

"The 'Darex copolymer No. 3' above referred to is an elastic type of synthetic rubber resin, made by copolymerizing butadiene and styrene to produce a Buna S with a high styrene content."

Would that carry a meaning to one in the art?

The Witness: I think it merely says that it is

(Testimony of Raymond B. Stringfield.)

a high styrene copolymer. Otherwise it does not even there state the percentage of styrene in Darex No. 3.

That is available from the Dewey and Almy literature and is not made a secret at all by the Dewey and Almy Company. In fact, they have several publications on it.

Q. (By Mr. Halle): Mr. Stringfield, I hand you a copy of Plaintiff's Exhibit 2, which is the file wrapper of the patent, and I turn to page numbered at the bottom 57, which is the first page of an amendment, which was received by the Patent Office on April 7, 1955, and I point out to you at this portion it says:

"insert The 'Darex copolymer No. 3' above referred to is an elastic type of synthetic rubber resin, made by copolymerizing butadiene and styrene to produce a Buna S with a high styrene content."

That is the portion that the Judge just read to you from the specification of the patent, and in accordance with this [358] exhibit it shows that was first amended into the specification as of April 7, 1955. Now, prior to that amendment did the patent teach anything at all about the composition of the copolymer?

You may look at the patent, and we will remove that portion that was just read starting at line 71, I believe, in column 2, and ending——

The Witness: There is a mention of Darex No. 3 further up in the column.

(Testimony of Raymond B. Stringfield.)

Q. A mere mention of the product as Darex No. 3, but removing those four or five lines, is there anything in the patent showing what Darex No. 3 is?

A. No, there is no mention of the composition of Darex No. 3, or of the amount used.

Q. Now I hand you Defendant's Exhibit M, which is a copy of Modern Plastics magazine for December 1948, and I ask you to read that portion "Molding High Styrene Resins," on page 190 of the magazine.

A. "Referring to a series of articles in Modern Plastics last summer concerning the development of high styrene-butadiene resins, the following letter has been received from the Dewey and Almy Chemical Company, a producer of that resin:

"We should like to point out that the designation which you used, Darex, is Dewey and Almy's [359] trademark for most of their products. The high styrene resins should have been referred to as Darex copolymers No. 3, X-34 and X-43.

"Your article mentioned that the high styrene copolymers had not been successfully injection molded. We might point out that one of the first plastic products made from Darex copolymer X-34 was an injection molded fluorescent light fixtures which you show in your Modern Plastics Encyclopedia. Since that time we have also made poker chips, coasters, and a variety of other products.

"Our more recent work has been to use Darex copolymer X-34 as an extender and plasticizer for

(Testimony of Raymond B. Stringfield.)

polystyrene in order to make the latter material useful in applications where ordinarily it would be too brittle. The X-34 greatly improves the impact strength.' Signed K. M. Fox, Organic Chemicals Division, Dewey and Almy Chemical Company, Cambridge 40, Massachusetts."

Q. Now, sir, does that article which bears the publication date on the magazine of December 1948—does that teach how to modify polystyrene with a high styrene copolymer?

A. Yes. Copolymer X-34 is a high styrene copolymer, and it says that they have been using it to increase the impact strength of polystyrene. [360]

Q. Now, I will use Mr. Miller's language for a moment and I will ask you considering what he testified to about a Buna S with a high styrene content, does that also teach modifying polystyrene with a Buna S with a high styrene content?

A. Definitely. If you call the high styrene resins Buna S resins, X-34 is a Buna S with a high styrene content.

Mr. Halle: I offer the magazine in evidence, your Honor.

The Court: It may be received.

The Clerk: M received.

(The exhibit heretofore marked Defendant's Exhibit M was received in evidence.)

Mr. Halle: I have offered some exhibits which I did not have copies of, and I would like to have permission when we are through today to withdraw

(Testimony of Raymond B. Stringfield.)

them and make photostats of them so we may retain the original volume.

Mr. Caughey: That is entirely satisfactory.

The Court: That may be done, and substitutes may be photostated. And any books, there is no use to leave the books.

Mr. Halle: We will make photostat copies of the pages referred to.

The Court: Where the paragraph was small and was read into the record there is no need to leave the book at all. [361]

All right. Go ahead.

Did I hear you say that the terminology "Buna S" is not used any more at the present time?

The Witness: It is practically obsolete at the moment, because it referred to the old sodium polymerization that the Germans developed, and we are using different catalysts at the present time. [362]

* * * * *

Direct Examination—(Resumed)

Q. (By Mr. Halle): Mr. Stringfield, I give you Defendant's Exhibit A for identification—just a moment. I don't believe this is in evidence yet. I would like to offer Defendant's Exhibit A, which is the Goodrich patent, in evidence.

The Clerk: May it be received, your Honor?

The Court: Yes, it may be received.

Mr. Caughey: For what purpose, may I ask, is it being offered?

Mr. Halle: It is being offered for every purpose that I can use it for. As prior art—

(Testimony of Raymond B. Stringfield.)

The Court: Is that one——

Mr. Halle: That is one we agreed upon in our prior [363] art list between counsel, that could be used as a prior art patent.

Mr. Kirschstein: We agreed there would be no objection to the use of a soft copy of it. There was no other agreement regarding this or any other prior art.

The Court: Has statutory notice been given that this is one of the patents you are pleading as anticipation?

Mr. Halle: We served interrogatories on the other side, and we also made a stipulation that all patents mentioned in the interrogatories could be used as if they were amended into the Answer, as notice of prior art.

Mr. Kirschstein: We are raising no objection on lack of notice, your Honor.

The Court: I beg your pardon?

Mr. Kirschstein: We are raising no objection on the ground that we didn't have sufficient notice. We are not raising objection on that ground.

The Court: What is your objection, then?

Mr. Kirschstein: The patent issued after the filing date of the suit patent. I believe that it is only admissible on the issue of prior invention; not on any other issue.

Mr. Caughey: It is not a publication, sir.

Mr. Halle: I will concede that it is not a publication prior to the filing date.

The Court: All right. Let it be received. The

(Testimony of Raymond B. Stringfield.)

[364] scope may be limited. I haven't the time to stop now and look at your interrogatories. Concededly it is introduced to show what—the status of the art?

Mr. Halle: As an anticipation under the well settled law——

The Court: Under that subdivision described in the patent?

Mr. Halle: That is right. 102E, I believe.

Mr. Caughey: 102E.

The Court: All right. It may be received.

(The exhibit heretofore marked Defendant's Exhibit A was received in evidence.)

Mr. Caughey: It may be received, your Honor, with the understanding that we don't agree that it can serve as an anticipation, if your Honor please.

The Court: I will say as bearing upon the art. Can we do it that way?

In many of these, in the Ford Alexander case, I think we had a book of about 60 of prior art, and I picked out about three that were the best references.

You know in every lawsuit a lot of patents are offered, and ultimately it becomes a question for the court to determine whether they are anticipatory or not.

When I reach that stage then I pick out the best references. Many a time, as you know, I ask counsel to [365] indicate what the best reference is.

So we need not discuss at the present time what bearing it has on any of the defenses that are

(Testimony of Raymond B. Stringfield.)

being made here. It is just being received as germane to the inquiry as to the validity of the patent.

They didn't plead all the 29 that Walker has, but most of them they did, the usual defenses.

Mr. Halle: Your Honor, I will simplify proceedings to this extent: This is the only patent that I will put in evidence and rely on as anticipation. I won't put any other patents in evidence.

The Court: All right.

Q. (By Mr. Halle): Mr. Stringfield, you heard the definition given yesterday by Mr. Miller for a copolymer with a high styrene content, and if my recollection serves me correctly it could mean anything with a styrene content above 25 per cent. Now, using that definition as a basis for these questions that I am going to ask you, I would like to ask you whether this patent, Defendant's Exhibit A, teaches modifying polystyrene with a butadiene-styrene content with a high styrene content in the copolymer?

A. In column 5, examples V and VI, both teach the use of a copolymer of butadiene with styrene in proportions of 50-50, and under Mr. Miller's definition that would be a high styrene copolymer in that it is above the normal percentage of [366] GR-S rubber.

Q. Does the Coleman patent, which is at issue herein, describe anything further than is described in examples V and VI? When I say "examples V and VI," I am referring to column 5 of Defendant's Exhibit A.

(Testimony of Raymond B. Stringfield.)

A. No; the Coleman patent merely says:

“* * * an elastic type of synthetic rubber resin, made by copolymerizing butadiene and styrene to produce a Buna S with a high styrene content.”

So that would, I believe, come under the same definition.

Q. Does the Goodrich patent, Defendant's Exhibit A, have any claims claiming the construction of a composition of polystyrene modified by a copolymer of a Buna S with a high styrene content, in accordance with Mr. Miller's definition?

A. Yes. Claims 5 and 6 both refer to the use of high styrene copolymers between 20 and 50 per cent of styrene.

Q. That is in claim 5?

A. That is in claim 5.

Claim 6 calls for equal parts by weight of combined butadiene and styrene.

Claim 7 calls for the same thing.

Q. So that both claim 6 and claim 7 claim a product made of polystyrene modified by a copolymer with equal parts of butadiene and styrene?

A. Yes. [367]

Q. And under Mr. Miller's definition that would be a copolymer with a high styrene content?

A. Yes.

Q. Let's get back to the definition that you gave this morning. That is a copolymer with more than 50 per cent styrene would be one with a high styrene content, and a copolymer with less than

(Testimony of Raymond B. Stringfield.)

50 per cent styrene would be one with a low styrene content. Am I correct in stating that definition? A. Yes, I would say that.

Q. Now, I will ask you to look at Plaintiff's Exhibit 63 in evidence. This is the stipulation about the contents of both the plaintiff's and the defendant's products. I ask you to look at paragraph 4a on the second page, and it states there that from about October 1951 until about July 1952 frames manufactured and sold by plaintiff were composed of a physical mixture consisting of a predominant amount of polystyrene and a minor amount of a copolymer known as Darex copolymer No. 3, sometimes with and sometimes without a minute amount of inorganic filler. The Darex copolymer No. 3 consisted of butadiene in the range of 30 per cent by weight and styrene in the amount of 70 per cent by weight. Now, would that copolymer in the combination of polystyrene and Darex No. 3, would that copolymer be a copolymer with a high styrene content or low styrene content?

A. In my opinion that is a high styrene copolymer.

Q. Now, I direct your attention to paragraph 4B where it states:

"From about July 1952 until about November 1952 plastic battery hold-down frames manufactured and sold by plaintiff were composed of Bakelite brand TMD 2155 only (this material at the time being known as BMSQ 155), the combination of this material being that defined in paragraph 2 hereof."

(Testimony of Raymond B. Stringfield.)

Now, I direct your attention to paragraph 2, that portion which reads as follows:

"The composition of Bakelite brand TMD 2155 is as follows:

"It is composed of a physical mixture consisting of a predominant amount of polystyrene, a minor amount of a copolymer of butadiene and styrene, a small fraction of anti-oxidant, and a small amount of pigment. The copolymer consists of butadiene in the range of 58 per cent to 62 per cent by weight and styrene in the range of 38 per cent to 42 per cent by weight."

Now, in your opinion, is that copolymer a high styrene content copolymer or low styrene content?

A. I would call that a low styrene copolymer.

Q. I again direct your attention to paragraph 4c. Again referring to the plaintiff's product and referring [369] particularly to a product by Monsanto Chemical Company, I read as follows:

"The last mentioned composition is at present designated Lustrex Hi-Test 89 and was formerly known as LT-1173 Red P 61-235-2 Lustrex LT and Lt-1173 Red PIB-2 Lustrex LT. The composition of the Monsanto material is as follows: It is composed of a physical mixture consisting of a predominant amount of polystyrene and a minor amount of a copolymer of butadiene and styrene. The copolymer consists of butadiene in the range of 60 per cent to 50 per cent by weight and styrene in the range of 40 per cent to 50 per cent by weight."

(Testimony of Raymond B. Stringfield.)

Now, in your opinion, sir, is that copolymer a high styrene copolymer or a low styrene copolymer?

A. I would call that a low styrene copolymer.

Q. I again direct your attention to Defendant's Exhibit A, that is the Goodrich patent, and ask you to look at claim 5, and I will read the last portion of that claim. It speaks about a molded battery container comprising a homogeneous mixture of high molecular weight polystyrene with from one-tenth to one-third its weight of a rubbery copolymer consisting of 50 to 80 per cent by weight of butadiene and 20 to 50 per cent by weight of styrene.

Now, I ask you to consider that the Bakelite product [370] TMD 2155 has a copolymer with the styrene in the range of 38 to 42 per cent. My specific question is this: Does the Bakelite material come within claim 5? A. Yes, it does.

Q. I just want to show you Defendant's Exhibit K in evidence, and I would like to read a portion to you and ask you whether you agree with it. This is the 1956 Modern Plastics Encyclopedia and Engineers Handbook, page 157, and I am going to read this portion from the middle of the second column on the page from an article by Donald S. Black:

"The most common and widely used of the synthetic rubbers today is the copolymer of butadiene and styrene—GR-S (Government Rubber Styrene).

"Butadiene and styrene are reacted in a range of ratios between virtually 100 per cent butadiene to 50 per cent butadiene/50 per cent styrene. With

(Testimony of Raymond B. Stringfield.)

products containing higher levels of styrene the polymer takes the form of a resin rather than an elastomer."

Do you agree with that statement?

A. Yes, sir, I would agree with that in general. There is no sharp dividing line, but products having over 50 per cent styrene are definitely harder and more resinous.

Mr. Halle: I have no further questions, your Honor.

The Court: All right. Cross examine. [371]

Cross Examination

Q. (By Mr. Kirschstein): GR-S is Buna S, is it not?

A. Yes, it comes within the general class of Buna S, although that term is practically obsolete at the present time.

Q. Was that term "Buna S" practically obsolete in 1949?

A. Yes. It was used occasionally, but it is simply a carry-over from World War I.

Q. I hand you a copy of the Dewey and Almy bulletin, Defendant's Exhibit J. That bulletin you will agree is devoted to a description of an item known as Darex copolymer No. 3.

A. Yes.

Q. Does not that bulletin describe that substance as a rubber?

A. It describes it as a special purpose—as one of a series of special purpose rubbers and resins, which Dewey and Almy are preparing.

(Testimony of Raymond B. Stringfield.)

Q. Does it describe it as a rubber, in your opinion?

A. It specifically mentions resin. Darex copolymer No. 3 is an elastic type of synthetic rubber-resin made by copolymerizing butadiene and styrene to produce a Buna S—they use that word—with a high styrene content.

Q. Are resins, as you understand the term, vulcanizable?

A. There are some resins that are vulcanizable. Belata, [372] for instance, is considered resin more than rubber, but it again is in that general intermediate classification. A resin can be either vulcanizable or not vulcanizable.

Q. Isn't it a fact that the capacity to be vulcanized is characteristic of rubbers in general?

A. The phenomena of vulcanization is one that is applied to rubbers to produce products having certain qualities, and most of the uses of resins do not particularly need vulcanization.

On the other hand, there are a large number of resins that are used as compounding ingredients in rubber to modify their characteristics, both in the uncured and the cured conditions to make rubber process more smoothly, to make it harder or softer in its vulcanized condition.

There are compounding ingredients that are widely used, and there is no sharp line between them.

Q. Is vulcanizes or vulcanizing a term in the rubber industry? A. Yes.

(Testimony of Raymond B. Stringfield.)

Q. What does that term refer to?

A. That term refers to a cross polymerization in which a basic material which has some double bonds present is linked, usually with sulphur, but occasionally with other compounds, to form a thermoset mixture, and usually—I should say a thermoset article, and usually an article which has appreciable [373] elasticity, although in the case of some hard rubbers that elasticity is very small.

Q. But most rubbers are vulcanized before they can be used, isn't that true?

A. In the big majority of cases, although there are a number of cases where unvulcanized rubbers are used, such as adhesive tapes and the industrial tapes, and certain gasket materials, and so forth.

Q. In most cases they are vulcanized, is that your answer?

A. In most cases rubber products are vulcanized, yes.

Q. Doesn't this bulletin teach the vulcanization of Darex copolymer No. 3?

A. Yes. This bulletin teaches the admixture of Darex copolymer No. 3 with other softer rubbers, and the later vulcanization of the mixture, and Darex copolymer No. 3 contains a small amount of double bonds, relatively small, and therefore is a vulcanizable material and vulcanizes along with other rubber in that particular application.

Q. Doesn't the bulletin also teach the use of Darex copolymer No. 3 by itself?

A. I am not sure.

(Testimony of Raymond B. Stringfield.)

Yes, sir, I believe it does.

Q. Where do you find that?

A. Under "Properties," where it mentions in the paragraph [374] "Properties": "For highest resistance to ozonolysis by high frequencies it should be compounded and vulcanized."

Q. It also says in that paragraph that it has been used alone as extruded insulation for radio and electronic equipment; isn't that true?

A. Yes.

Q. And isn't that a use of the material as a rubber?

A. Yes, sir, that's right. All of these high styrene copolymers have been used for such things as insulation, where they want a stiff product, and some of those uses they are vulcanized and used alone.

Q. And they are used as rubbers?

A. Yes, of that type.

Q. If you will turn to the second page of the bulletin. Refer to the paragraph "Processing." Doesn't that describe a process of compounding rubber?

A. Yes, it does.

Q. You would agree, would you not, therefore, that Buna S's with styrene contents over 50 per cent are and have been treated as rubbers in the industry?

A. They are compounding ingredients which are used in the rubber industry, and sometimes used alone, yes.

(Testimony of Raymond B. Stringfield.)

That is an entirely different use than their use in the plastics industry.

Q. But they are treated as rubbers, is that not true? [375]

A. They are one of the vulcanizable compounds, and they themselves take place in vulcanization, so they can be said to be rubbers for that purpose, although they have resinous characteristics.

Q. I ask you if they are treated and called rubbers?

A. Yes, sir, that word is used.

Q. Wasn't Pliolite S-3 known as a rubber in 1949?

A. The only use for Pliolite S-3 that I know of in 1949 was as a rubber compounding ingredient, so that although it is recognized that it was a specially treated resinous rubber, it was used in rubber compounding and thought of as a specialty rubber. Resinous rubber, however.

Q. I believe you testified that this dividing line that you drew of 50 per cent between the high Buna S and the low Buna S was not a definite line; is that true?

A. There is no sharp line. The rubber manufacturers list no GR-S's that have over 50 per cent styrene in them, and the only use for the ones that are up in the 40 to 50 per cent range that has amounted to any tonnage has been in the latex form where they are using them for adhesives. The lower styrene copolymers being more useful for flexible rubbers.

(Testimony of Raymond B. Stringfield.)

Q. I believe your answer to my question was that the line isn't definite. Is that right?

A. That is right. [376]

Q. How flexible is this definition? How about 46 per cent styrene, is that a low or a high Buna S?

A. By picking this arbitrary point I would say that that is a low Buna S, because it is rapidly becoming a low styrene Buna S, if you want to use that term, because it is rapidly becoming more rubbery as the percentage of styrene is decreased.

Q. But you testified that the line you drew was not a definite one, so I am trying to find out how much lower or higher than 50 per cent you would go, if the 50 isn't definite. Could you within your definition go as low as 46 and still call it Buna S with a high styrene content?

A. The rubbers between 40 and 50 are considered pretty rubbery, so if you were going to draw a line at all and make a line of demarcation, I would say that those are low styrene rubbers.

Q. What I am trying to find out is how rigorous that line of demarcation is. In other words, are you prepared to say that 49 per cent styrene is a low Buna S and 51 is a high Buna S?

Do we have any range in there?

A. I don't think that you can pick a definite point any more than you can say on a spectrum where you begin to run from red to orange. You have a change that is so gradual that there is no specific point. When you get over into 70 per cent

(Testimony of Raymond B. Stringfield.)

styrene you definitely have a high styrene content.

[377] When you get down to 25 to 40 per cent styrene, you definitely have a low styrene content.

Q. How about 42 per cent?

A. Well, that is closer to the low than it is to high. I would say it is definitely a low styrene content.

Q. When you were giving a definition were you referring to the charge of the latex or to bound styrene content?

Q. You don't mean the charge of the latex. You mean the charge of the raw ingredients in making the polymer.

Q. That is what I mean.

A. The charge of the raw ingredients in making the polymer is always a little bit higher than the actual composition of the powder—of the polymer, I should say. Actually you will find in the normal GR-S they charge 25 per cent styrene and come out with a polymer that averages about 23½. Because some of the styrene is not polymerized and some of the butadiene is not polymerized, and that is removed at the termination of the reaction, and the resulting compound has about 23½.

You will find the same thing if they charge 50-50, the resulting compound, depending on just how far it is carried, will have somewhat less than 50 per cent styrene ordinarily.

Q. If you charge 50-50 you probably would end up with a 45——

A. About a 42 to 45 or thereabouts. [378]

(Testimony of Raymond B. Stringfield.)

Q. Let me ask you about a 50-50 charge. Is that a Buna S with a high styrene content?

A. Inasmuch as you are making a rubbery product, I think that is about the line that you want to draw for a GR-S with a low styrene content.

You certainly are charging far above that when you are making polymers with the 70 to 85 per cent styrene.

Q. I take it that your definition which you have drawn is totally unrelated to standard GR-S, isn't that correct? A. What per cent?

Q. Standard GR-S under your definition is a low styrene Buna S, is that right?

A. GR-S is the term that is referred to in making the Government rubbers, and the most common GR-S that was used during the war and that is still used is in the 25 per cent range.

There is a slight difference between the GR-S which is made by the so-called hot process at 122 degrees Fahrenheit, and the cold process at 40 degrees Fahrenheit. But those are rubbers that were made in the Government synthetic plants.

Now, the work on the high styrene copolymers was all done independently by these various companies. It was not that they didn't do experimental work, but there were no high styrene copolymers put out by the Government program. They were put out by individual companies. The first one that was [379] on the market was the Pliolite S-3, which was put out by Goodyear, and that was followed

(Testimony of Raymond B. Stringfield.)

by the Dewey and Almy copolymers and later by some of the others.

Q. Suppose we took GR-S, the all purpose rubber, the 25 per cent, as our standard, wouldn't it be true that those rubbers with a substantially higher content than 25 would be high styrene content Buna S's, and that those——

A. I would not use the word "Buna S."

That is being used incorrectly there, and they are not considered high styrene rubbers because they are too flexible. There is a slight difference in properties. But you can go up to 30, 35 per cent there and still have a rubbery product that will actually make a good tire. But it was not selected under the combination of properties that was wanted.

Q. I would like you to listen to my question and I will ask it again.

If you take GR-S as a standard, 25 per cent styrene, if that were the standard wouldn't it be true that Buna S's or GR-S's, if you will, with a substantially higher styrene content, would be high styrene Buna S's in comparison to the standard?

A. They would be higher than the standard, yes.

Q. And those below would be low?

A. Assuming that you take that for a standard, yes.

Q. That is what I am assuming. [380]

A. Yes.

(Testimony of Raymond B. Stringfield.)

The Court: You would have to call it intermediate?

The Witness: It depends on whether you are considering the whole field of butadiene-styrene copolymers or whether you are considering the GR-S rubbers. The GR-S rubbers can be taken as high or low around the GR-S which is the most used, but the whole field involves polymers going up as high as 95 per cent.

The Court: And you feel to take that GR-S as a standard is not proper because that is a rubber standard and isn't a resin standard; is that correct?

The Witness: That is right. And because those rubbers are used for quite different purposes than the original high polymers.

In fact, there were none of the intermediate range polymers being used in the early stages of this prior to along in 1948 or thereabouts.

Q. (By Mr. Kirschstein): Mr. Stringfield, you just said, I believe, if you take it on the basis that they are used for different purposes. That is why you don't want to take the GR-S standard with 25 per cent as the standard, isn't that right, because you are talking about different purposes between rubbers and resins—isn't that correct?

A. We are talking about copolymers of butadiene and styrene, and there is no particular reason for picking GR-S [381] as a standard base above which you are going to say one is high and the other is low. GR-S is nothing but a synthetic

(Testimony of Raymond B. Stringfield.)

rubber and doesn't bear any particular significance to the uses for which the high styrene copolymers were introduced.

Q. But isn't it a fact, Mr. Stringfield, that the literature you, yourself, have testified as to shows these 70 per cent copolymers and the 40 per cent copolymers used for the same purpose to modify polystyrene?

A. Later.

Q. Later, but it shows it, isn't that true?

A. The 70——

Q. And it does not show 25 per cent being used?

A. Let me quote from the India Rubber World of October 1946, page 66, which is Defendant's Exhibit L, in the first paragraph:

"In this classification of high styrene copolymer resins are found resins which have styrene-diolefin ratios"—that means butadiene—"ranging from 70 per cent styrene to under 95 per cent styrene. The general properties and uses of these resins in rubber compounds have been discussed in the literature."

This is written by Sell and McCutcheon, who are in the chemical products development division of the Goodyear Tire & Rubber Company, and who obviously at that time considered the high styrenes with 70 to 95 per cent styrene [382] copolymers.

Q. Let's go back to my question.

You have presented literature going back I believe to '48, at least, showing what you consider a high styrene copolymer being used to modify polystyrene; isn't that true?

A. Yes.

(Testimony of Raymond B. Stringfield.)

Q. And the Bakelite material, which apparently was available in 1952, shows a copolymer of 38 to 42 being used for the same purpose, isn't that true, to improve the qualities of the polystyrene?

A. Yes, the Bakelite literature shows, that they used about a 40-42 per cent copolymer as a compounding ingredient in polystyrene in—whatever that early date was.

Q. '52, I believe, is the earliest we have. That is in the stipulation. A. Yes.

Q. That is the same use of the copolymer as the use of the Darex copolymer that is shown in the other literature, isn't that true?

A. Yes, that is used in polystyrene for the same purpose.

There is nothing to show whether the percentage used is the same or not, and there are no comparative figures given as to impact resistance. But that copolymer of about 42 per cent styrene is used for the same purpose as the earlier [383] copolymers of 70 to 85 per cent polystyrene were used, but is a later development.

Q. These two copolymers, one in the 70's, and one in the high 30's and low 40's, are used for the same purpose——

A. To make high impact polystyrene.

Q. And they both are substantially higher than standard GR-S, the 25 per cent copolymer, that is not shown used for that purpose, isn't that true?

A. That is right.

Q. Your definition of the difference, or your

(Testimony of Raymond B. Stringfield.)

basis for drawing your line at 50 per cent, is because the more rubbery materials under 50 are used for different purposes than what you call the more resinous materials above 50; isn't that right?

A. Yes, that is right. The bulk of the usage of the materials under 50 per cent has been for rubber purposes, but after this later development there is some usage for the material around 40 per cent, taking over a use that was originally confined to the high styrene copolymers.

Q. Isn't it true, though, that as far as the purposes that we are concerned with here, which is to modify polystyrene, the standard that should be taken is the standard GR-S?

A. I don't know as you can say that.

Q. You don't agree with that?

A. No. You are talking about synthetic resins and not [384] talking about rubbers.

Q. Whether you call them resins or rubbers, they are both used for the same purposes as far as modifying polystyrene?

Mr. Proujansky: I object to that as already answered. There is no use going over this time and time again.

The Court: That is all right. It is proper cross examination.

You may answer.

Mr. Kirschstein: Would you read the question.

(Question read by the reporter.)

The Witness: Yes, in the plastics industry they are both used for the same purpose.

(Testimony of Raymond B. Stringfield.)

Q. Now, the term "high impact polystyrene," I take it, is one that has meaning to you?

A. Yes.

Q. What is the earliest high impact polystyrene you know of?

A. The first one that I know of was Dow 475, which came on the market about 1947 or '8.

Q. So——

A. There is an article in one of the journals which tells when Dow polystyrene came on the market. It was made in a different manner.

Q. How was it made?

A. It was made by adding additional amounts of styrene [385] and butadiene monomer to partially polymerized styrene, so as to get a different effect from what you would have if you started with the entire batch and carried on the polymerization at the same time, and therefore does not come under the exact patent, but was a large improvement in the art at that particular time.

Q. In other words, it was a chemical compound, not a physical mixture?

A. That's right.

Q. Let me confine my question. When did the first high impact polystyrene that was a physical mixture of polystyrene and something else come on the market, and what was the something else?

A. The December 1948 India Rubber World, which is in evidence. No. The December 1948 Modern Plastics.

The Clerk: Exhibit M.

(Testimony of Raymond B. Stringfield.)

Q. (By Mr. Kirschstein): That is the one you testified from before?

A. Yes. That mentions the fact—December 1948 *Modern Plastics*, on page 190, mentions the fact that the Darex copolymer X-34 has been used as an extender and plasticizer for polystyrene in order to make the latter material useful in application where ordinarily it would be too brittle.

That is in this letter from K. M. Fox of Dewey and Almy. [386]

When they put that first on the market as a compound I do not have a date, but this was published in a journal of circulation in December 1948.

Q. This is a letter from Mr. Fox?

A. From Mr. Fox to the magazine.

Q. Do you know whether the material that he is referring to has a name or had a name?

A. No, I do not know.

Q. Do you know whether it was a successful material?

A. No, I do not know.

Q. And you don't know—

A. I know that high impact styrenes became available shortly around that period, because the toy manufacturers in particular were troubled—

Q. The what?

A. The toy manufacturers were greatly troubled by breakage of styrene toys and other styrene articles, and had been very anxious to get styrene of higher impact, it being the cheapest molding powder available for making toys.

(Testimony of Raymond B. Stringfield.)

Q. Did Bakelite have a high impact polystyrene in 1948?

A. I don't know the date that Bakelite TMD 2155 came out, exactly. It was not long after that.

Q. It was not long after that? A. No.

Q. What is the first successful high impact polystyrene made by physical mixture of rubber and polystyrene that you know of?

A. Monsanto had a Lustrex compound, and Bakelite had their 2155, and I don't know just which one came on the market first. And there may have been some experimental numbers that were used during that development period that there was a lot of activity around about that time.

Q. What is that time? What is the earliest recollection you have of such a compound being out? A. Around 1949.

Q. Do you have anything that can substantiate that statement, besides your recollection?

A. I am not sure—I don't believe I have anything personally that I can lay my hand on at the moment. I do not have any data personally from Bakelite as to when they put those on the market, although I was involved in a case involving high impact styrenes that referred to that data some time ago.

Here is—is this in evidence (indicating)?

Q. Let me ask you a question: Do any of the references of any kind about which you testified on direct show the Bakelite or Monsanto material

(Testimony of Raymond B. Stringfield.)

as being available at the time you [388] indicate, namely, around 1949?

A. No, I believe not. This bulletin of the Bakelite molding materials talking about TMD 2155 says that it was introduced by the Bakelite Company in 1951.

Q. That is what the bulletin says?

A. Yes.

Q. That is two years later than you testified before, isn't that right?

A. Yes. I think that in all probability any earlier material that was available was experimental samples except for Dow's 475, which did come on the market earlier and which was a chemical combination, rather than a physical mixture.

Q. That composition doesn't have anything to do with this particular situation?

A. I believe Dow 475 is not pertinent to this case.

Q. Does the bulletin indicate when in 1951 they came up with this material?

A. No, it does not.

Q. Coming back to the 1948 Modern Plastics Reference that we were just speaking of, that letter from Mr. Fox, does that article give you any information about the proportions of the copolymer and the polystyrene?

A. No, it does not.

Q. Does it give you any suggestion or does it teach the use of that material for anything? [389]

(Testimony of Raymond B. Stringfield.)

A. For applications where ordinary polystyrene would be too brittle.

Q. Does it teach the application of the material to any particular thing?

A. No. It merely says to make the material more useful in applications where ordinarily it would be too brittle. Copolymer X-34, of course, is known as an 85 per cent styrene copolymer.

Q. If you will look at the 1950 Modern Plastics Reference, please.

A. I do not have that here.

Q. It is that one. A. Yes.

Q. If you will look at the first paragraph which you read on page 754, the right-hand column, "A New Styrene-Base Copolymer."

A. This is Defendant's Exhibit T and is the Modern Plastics Encyclopedia and Engineer's Handbook of 1950, page 754.

Q. If you will look at the first paragraph you read, that refers to a copolymer, is that correct?

A. Yes, a copolymer blended with natural or synthetic rubber, not with polystyrene.

Q. Blended with natural or synthetic rubber, and it suggests what that can be used for, is that correct? [390]

A. It suggests that it has high impact resistance, low water absorption.

In the next paragraph it suggests——

Q. No, no. The same paragraph, sir. Doesn't it say, "Of particular note is its resistance to battery acids"?

(Testimony of Raymond B. Stringfield.)

A. No, it doesn't say battery acids in that paragraph.

Q. On the next page in the same paragraph it says "Initial applications have included battery cases"?

A. Which page are we talking about now?

Q. I will show you. Here is the paragraph I am talking about, and here is the statement up here.

A. Yes.

The Court: It is part of the same article, isn't it, sir?

The Witness: Yes, it is.

Q. (By Mr. Kirschstein): Now, referring to the second paragraph you read, which spoke about a blend, first of all does that paragraph suggest any article that the blend can be used for?

A. Yes, it suggests that it is useful for textile spools, chemical buckets, photographic trays, chemical piping, and other uses where hard rubber was formerly employed.

Q. I am talking about the second paragraph you read, which is the first complete paragraph beginning on page 755, which says, "Another high styrene butadiene copolymer has been [391] blended with polystyrene." Do you see the paragraph I mean?

A. Yes, I see.

Q. Does that paragraph suggest any use for the material it is speaking of?

A. No, it doesn't suggest any specific uses in that paragraph.

Q. Isn't it true that the other materials referred

(Testimony of Raymond B. Stringfield.)

to in this article are all tied up with specific uses?

A. They seem to mention specific uses in most cases. I haven't checked every one of them, but they give properties and suggest a use or two.

Q. But in this case they don't suggest any use, do they?

A. They don't in that particular paragraph.

Q. Is there any indication of a commercial name for the blend itself?

A. Not the blend itself, no. They merely mention the copolymer X-34 and say that it has been blended with polystyrene to give tough transparent blends.

Q. Does it give any proportions of these blends?

A. No.

Q. Isn't it true that you could have over 50 per cent of the copolymer in such a blend under this description?

A. They give no proportions, so you would have to experiment to get properties that you want.

Q. But could you under this description as a blend have a mixture that would have over 50 per cent of the copolymer and less than 50 per cent of the polystyrene?

A. Yes, I presume you could.

Q. Now, let me ask you this: If you have less than the 50 per cent of the polystyrene, it would not be a modified polystyrene, would it; it would be a modified copolymer?

A. I suppose that would be correct, yes.

They do not call it a modified copolymer, they

(Testimony of Raymond B. Stringfield.)

just say it is blended with polystyrene to give tough, fairly transparent blends.

Q. You don't know which it is, though?

A. It might be either one.

Q. The suit patent refers to polystyrene modified by a copolymer, doesn't it? A. Yes.

Q. So that material definitely is polystyrene predominantly, isn't that true?

A. This paragraph further down——

Q. Would you please answer my question?

A. Yes, sir, your suit patent definitely refers to polystyrene modified with a copolymer, that is correct.

Q. You were going to point something out.

A. Further down in the paragraph it says:

"The company points out that the polystyrene [393] in such a combination contributes low cost, surface hardness, and glossy finish while the high styrene-butadiene copolymer gives higher elongation, impact strength, and good mold flow."

Therefore you would presume that they are talking about modifying polystyrene with the copolymer, rather than modifying the copolymer with polystyrene.

Q. Why is that?

A. Because it points out that the polystyrene in such a combination contributes the low cost surface hardness, and so forth, that it is the cheaper of the two materials.

Q. Doesn't it also say that the high styrene butadiene copolymer contributes certain qualities,

(Testimony of Raymond B. Stringfield.)

also? A. Yes, sir, that's right.

Q. Why not take that as the major ingredient? The answer is that you can't tell from the reference, isn't that true?

A. I think that is probably technically correct.

Q. Coming to Defendant's Exhibit A, that is, the Ditz patent, I believe you will note that patent is assigned to Goodrich. A. That is right.

Q. Are you familiar at all with the Goodrich Company? A. Quite so, yes.

Q. They make finished products, isn't that true? [394] I mean they don't manufacture molding powders like Bakelite supplies to others?

A. They do. Their chemical division manufactures a great many raw materials that are used in the rubber industry and sells them universally.

Q. I don't understand your answer.

A. The Goodrich Company has a subsidiary chemical division which supplies raw materials to the plastics people and the rubber trade.

Q. Do they make polystyrene molding powders?

A. The B. F. Goodrich Company itself, I believe, does not make polystyrene, but I believe they do make the molding powder TMD 2155, which is the blend.

Q. That is the Bakelite material?

A. I beg your pardon. They do not make that one. They supply a large amount of raw material to the rubber and the plastic trade. Now, whether that currently includes a reinforced polystyrene molding powder, I do not know.

(Testimony of Raymond B. Stringfield.)

Q. But in any event, they do make finished articles, that is certainly true, isn't it?

A. They make finished rubber articles. I do not believe they make any finished plastic articles.

Q. In other words, the article disclosed in this patent you wouldn't think was made by them, is that true?

Mr. Halle: I object to that question. [395]

The Court: He says he isn't familiar with their activities. He was asked if this has been reduced to practice.

The Witness: To the best of my knowledge, the B. F. Goodrich Company or its subsidiaries do not themselves make a battery box.

Q. (By Mr. Kirschstein): Do you know whether this material that is shown in the examples you refer to ever came on the market—that is shown in those examples you referred to?

A. I do not know whether that was ever put on the market by them under that patent.

Q. (By Mr. Kirschstein): Do you find that material in the 1950 Modern Plastics Reference? I take it you are familiar with that reference?

A. Yes.

Q. Did you find that material in there?

A. No, I do not find the material by Goodrich in there.

Q. If you will turn to page—I am afraid I will have to look at yours. My copy is distorted.

The Court: Do you want a short recess?

(Testimony of Raymond B. Stringfield.)

Mr. Kirschstein: I am almost done with this point, your Honor.

The Court: All right.

Mr. Kirschstein: I think I will be finished fairly soon. [396]

The Court: All right. We will have a short recess, then.

(Recess taken.)

The Clerk: All parties are present, your Honor.

The Court: All right.

The Clerk: Mr. Stringfield continues testimony.

Q. (By Mr. Kirschstein): On page 762 of this Modern Plastics Reference, in the right-hand column is a heading Other Butadiene Styrene Copolymers, and you will find I think in the fifth line Hycar OS-10. A. Yes.

Q. And the footnote c after Hycar refers to B. F. Goodrich Chemical Company? A. Yes.

Q. Is that correct? A. Yes.

Q. Further down in that column it describes Hycar OS-10 as a 50-50 butadiene styrene copolymer. A. Yes, this is correct.

Q. So the copolymer is shown? A. Yes.

Q. But not the mixture with polystyrene?

A. They make a number of copolymers that they sell as Hycar under different numbers to the trade, and I had forgotten about the OS-10 being one of them. It is not used in the [397] rubber industry very much.

Q. But the mixture of the copolymer and the polystyrene is not shown in this reference, is it?

(Testimony of Raymond B. Stringfield.)

A. That is correct.

Q. I take it you are familiar with these Bakelite and Monsanto materials, is that correct?

A. Reasonably so, yes.

Q. Does the polystyrene in these materials have improved heat resistance over plain polystyrene?

A. Which ones are you referring to specifically now?

Q. 2155 and Lustrex Hi-test 89. I believe I can give you the bulletins which describe these.

Handing the witness Exhibits 76 and 73.

A. Those have slightly improved heat resistance over the un-modified polystyrenes, but their main quality is an improved impact resistance.

Q. In other words, they have improved building strength and toughness?

A. Toughness in particular, yes.

Q. Mr. Stringfield, weren't there standard mixing methods for different rubbers with each other in 1951?

A. No, that is not the case for any type of a blend. You have to, by experiment, find the type of mixing which will do the best job, and the temperature at which it is done, whether you are doing it on a mill or in a Banbury mixer. [398]

Q. How about polystyrene?

A. The same thing would be true, you would have to find out by practice whether or not you want to introduce your polystyrene on the mill first and then add the rubber, or vice versa, and at what

(Testimony of Raymond B. Stringfield.)

temperature and speed of addition was most effective.

Q. If you were given two rubbers whose properties were described to you, would you know how to mix them?

A. With the background that I have of a good many years of experience in mixing, I could probably make a very good guess. But I would probably modify my first attempt in one direction or another to improve it after I had tried it.

Q. To improve it, but could you make a pretty good guess to begin with?

A. You might be able to make a fairly good guess to begin with yes, but given no proportions you would have to make a number of different batches and do testing to see what you wanted to get in the way of certain properties.

Q. Darex Copolymer No. 3 is a trade name, isn't it? A. Yes.

Q. In 1951 the composition of the material so designated was known, isn't that true?

A. In 1951, yes, I believe so.

Q. So that anybody reading this trade name could find out what the material was that was designated? [399]

A. They could at least find out from company literature what the percentage of styrene was, yes.

Mr. Kirschstein: That is all.

The Court: The company wouldn't let you know, I gather from the letter that was introduced yester-

(Testimony of Raymond B. Stringfield.)

day, that they didn't like to disclose the percentages because of trade secrets?

Mr. Kirschstein: I brought that out because they mentioned on the direct the patent doesn't say what Darex Copolymer No. 3, the percentages, are. I bring out that the trade name designates an article of known composition at the time of the patent. That was my purpose in asking this question.

Mr. Caughey: I think the letter your Honor had reference to was the Bakelite letter. This was Dewey and Almy.

Mr. Kirschstein: Dewey and Almy disclosed the composition, and it was known. That was all I wanted to prove.

The Court: I am sorry. I remember now.

Redirect Examination

Q. (By Mr. Halle): Mr. Stringfield, I just want to clear up one point about GR-S.

Is GR-S a general term in the art or is that something [400] that the government puts on for specifications?

A. GR-S was used solely for rubbers made under government supervision, and although the trade says GR-S when they refer to the general purpose GR-S, specifically it should be accompanied by a number, and the only GR-S's are rubbers that were made in the government plants and given a definite type number.

The Court: That is when the government was helping develop synthetics?

(Testimony of Raymond B. Stringfield.)

The Witness: When plants were being operated under government supervision.

Now when they have been returned to private, the companies all use individual names of their own.

Mr. Halle: Thank you. I have no further questions. [401]

* * * * *

The Court: Call it W and then -1, -2, -3, -4, -5, whatever you have got.

I discovered a little coincidental date; that the Coleman application was filed the day before the Ditz patent was issued.

Mr. Caughey: That's right.

The Court: The Coleman application was filed December 10, 1951, and the Ditz patent was issued December 11, 1951, the very next day.

It doesn't mean anything, but you rarely come upon that. [402]

* * * * *

Mr. Halle: V is a catalog of the Whitaker Cable Products Company. This is a current catalog of the company that made that steel frame with the red plastic covering on it. I offer that catalog in evidence.

The Court: I can take judicial notice of the fact that some of these accessories made of rubber are either in black or in red. I think perhaps the most common that you can see out of boxes are the fan belts. I think most of them are red.

Mr. Halle: Yes, your Honor.

The Court: And they are displayed very freely,

and they are not in packages. I know I have traveled all over the country and I have seen black ones in some parts of the Middle West. I think out here they are all red.

V is received, and the five patents, Exhibit W [404] through W-4 are received.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit V.)

Mr. Halle: We are now ready, your Honor. Mr. Proujansky will read the answers.

This is the deposition of Peter Maitland, and it is Exhibit No. 77 for identification.

(Whereupon counsel commenced the reading of the deposition of Peter M. Maitland, as follows:)

DEPOSITION OF PETER M. MAITLAND

“Q. (By Mr. Kirschstein): Would you state your full name, address and age, please?

A. Peter M. Maitland, Neck Road, Lancaster, Massachusetts. I'm forty-eight years old.

Q. What is your occupation, Mr. Maitland?

A. I'm assistant to the Executive Vice-President of Van Brode Milling Co.

Q. Is that the plaintiff in these cases?

A. That is right.

Q. Who is the Executive Vice-President?

A. Mr. Erich Fritsch.

Q. How long have you been employed by the plaintiff?

A. Since November 15, 1948.” [405]

(Deposition of Peter M. Maitland.)

Now turn to page 6, the top of the page.

(Whereupon counsel resumed the reading of the deposition of Peter Maitland as follows:)

“Q. Are you familiar, generally, with the business of the plaintiff? A. I am.

Q. Are you familiar with its automotive business? A. I am.

Q. Are you familiar with the plastic battery hold-down frames involved in these cases?

A. I am.

Q. Do your duties relate in any way to those plastic battery hold-down frames?

A. They have, during the course of my employment.”

Mr. Halle: Please turn to page 19, the first question at or about the middle of the page there.

(Whereupon counsel resumed the reading of the deposition of Peter Maitland as follows:)

“Q. Do you know anything about the chemical composition of this battery hold-down frame?

A. I do not.

Q. You said you do not? A. I do not.

Q. Did you ever know anything about its chemical [406] composition?

A. I do not. I never have.”

Mr. Halle: Please turn to page 23.

(Whereupon counsel resumed the reading of the deposition of Peter Maitland as follows:)

“Q. Can you remember any specific company

(Deposition of Peter M. Maitland.)

that you tried to interest in purchasing the plaintiff's frames?"

Mr. Halle: Then there was some colloquy, and then the answer was:

(Whereupon counsel resumed the reading of the deposition of Peter Maitland as follows:)

"A. I have never tried to sell any jobbers or wholesalers.

Q. Have you ever tried to sell anyone other than your friends?

A. Well, I have tried to interest some of the automobile manufacturers in taking it on as original equipment.

Q. Were you successful in those endeavors?

A. Not as yet.

Q. When did you first start that?

A. The question, as I see it now, is when did I [407] first try to——

Q. ——interest manufacturers in using this plastic frame as original equipment on cars."

Mr. Kirschstein: Excuse me, your Honor. There is an objection here to this line of questioning as exceeding the scope of the direct examination.

The Court: I beg your pardon?

Mr. Kirschstein: There was an objection put on the record at the time this deposition was taken that the examination exceeded the scope of the direct, which did not relate to this.

Mr. Halle: I am asking this witness now, your

(Deposition of Peter M. Maitland.)

Honor, when he tried to sell the automobile manufacturers this plastic battery frame.

The Court: We have already learned, gentlemen, that whatever success this frame has had has been due to jobbers and——

Mr. Halle: I have another purpose. I am trying to show that this witness did something insofar as the patent application is concerned which perhaps he shouldn't have done, and this is—I am building up to that by asking these questions.

Mr. Kirschstein: Your Honor, I think——

The Court: I am familiar now with the attacks [408] that are being made on what was done in the Patent Office, but I don't remember that you pleaded fraud or misrepresentation in the Patent Office.

Mr. Halle: Let me check. I believe there is some defense in the answer.

The Court: Of course, I have also held that it is about time the patent bar learned the Federal Rules of Procedure and not just follow those general allegations as you find them in the back number of Walker, the old edition especially.

Unless you specifically pleaded it, I don't think the matter should be gone into.

Mr. Halle: I am looking for the allegations now, your Honor.

The Court: You gentlemen know better than I do. Do you find any pleading of misrepresentation?

Mr. Halle: I find in the Answer in the third defense, subparagraph 7——

(Deposition of Peter M. Maitland.)

The Court: Just a minute. Let me get a hold of it.

Mr. Halle: It is on page 3 of the answer.

The Court: What line?

Mr. Halle: Line 23, starting paragraph 7.

The Court: I think you pleaded some kind of misrepresentation there. [409]

Mr. Kirschstein: Your Honor, I would like to say this: This concerns a petition to make special.

The Court: Which?

Mr. Kirschstein: The material that they are trying to introduce now concerns simply a petition to make special. I don't see what it would possibly have to do with——

The Court: I want to say that counsel will have to be more successful than some recent attempts that have been made. I dislike the attempt to bring fraud into these matters, and I was shocked and I expressed my shock when a man in one of the cases came in and repudiated an affidavit that he wrote. I let him know that I thought very little of him.

Counsel is free to do it, but you will have to be very successful. More successful than recent attempts to show that either statements made by persons or by lawyers or by others are necessarily fraudulent, unless you show, as I said recently in one case, there is scienter, that they knew. That was in the Ford Alexander case. I said, before you can prove fraud in the Office you have to show that not only was some statement made that wasn't true, but it was made with the intention to deceive.

(Deposition of Peter M. Maitland.)

Mr. Halle: Yes, your Honor.

The Court: Go ahead and prove it.

Mr. Halle: I will try.

I have just read these questions that indicated that [410] the witness never knew anything about the chemical composition of the frame. Now I am reading about his attempts to interest car manufacturers, and the last question: "Q. —interest manufacturers in using this plastic frame as original equipment on cars."

That was the time when that was attempted to be done.

The Court: All right.

The objection is overruled. Go ahead.

Mr. Halle: At page 24 start reading the answer, "I'd say approximately May or June * * *"

(Whereupon counsel resumed the reading of the deposition of Peter Maitland as follows:)

"A. I'd say approximately May or June of 1954.

Q. Since May or June of 1954, to date, you have not been able to interest a car manufacturer in using this plastic frame as original equipment; is that correct?

A. In addition to my other duties, of course, as I have said previously, since October of 1955 I have not done anything with the hold-downs as far as sales are concerned.

Q. Anyway, since May of 1954 until October of 1955, you were not able to interest a major car manufacturer in using your frame on a car?

(Deposition of Peter M. Maitland.)

A. On the contrary, I will not say that I was not successful in making them interested.

Q. Did you sell any frames? [411]

A. I did not.

Q. Do you know whether your company sold any frames to a car manufacturer for original equipment during that period?

A. During that period?

Q. Right.

A. I do not believe they did."

Mr. Halle: I am skipping down to the bottom of page 25.

(Whereupon counsel resumed the reading of the deposition of Peter Maitland, as follows:)

"Q. Have you ever seen a copy of Patent No. 2710660?

A. I have seen a copy of the patent."

The Court: That is the Ditz patent?

Mr. Halle: That is the suit patent.

(Whereupon counsel resumed the reading of the deposition of Peter Maitland, as follows:)

"Q. I hand you Defendants' Exhibit A, which is a copy of Patent No. 2710660, and I ask you when is the first time you saw a copy of that patent.

A. Frankly, I couldn't answer it. I'm not positive of the date. I probably have seen it in the last year, or year [412] and a half possibly, or even maybe further back than that. I don't just recall.

Q. But, in any event, you are not familiar with

(Deposition of Peter M. Maitland.)

the chemical composition that plaintiff claims in the patent, Defendants' Exhibit A?

A. I am not.

Q. As your counsel phrases it, you are not familiar with the chemical composition of the article made of a specific material which is disclosed in Defendants' Exhibit A? A. I am not."

Mr. Halle: Then the file wrapper of the prosecution was marked Defendants' Exhibit K on the deposition, and it is, I believe, Plaintiff's Exhibit 2 in this case.

The Court: All right.

What portion do you want to refer to?

(Whereupon counsel resumed the reading of the deposition of Peter Maitland as follows:)

"Q. I hand you Defendants' Exhibit K for identification and direct your attention to the following pages — which are page numbers of the exhibit — pages 47, 48 and 49. This is an affidavit, and I ask you whether this is your signature on page 49, which has the typewritten figure "4" on the page.

A. It is.

Q. And the three pages I mentioned were subscribed and [413] sworn to by you on the 27th day of January 1955? A. That is right."

Mr. Halle: That is pages 47, 48, and 49, your Honor.

Mr. Kirschstein: Your Honor, I would like to object to the evidence about to be read on this ground. Having established the witness' signature

(Deposition of Peter M. Maitland.)

to this affidavit, the witness was not examined on it, but the next witness, Mr. Fritsch, was then examined on it, counsel neglecting to examine the witness who could have explained anything about the matter.

I would like to mention, also, the petition to make special that was involved here was not considered by the Patent Office, even, because the appeal decision was about to be handed down. So it couldn't have affected this case in any manner whatsoever.

The Court: Any statement made in the course of any proceedings—ultimately this proceeding before the Board of Appeals was a part of the proceedings in the prosecution of the patent, and the file wrapper is admissible, and if there are any statements inconsistent with what a witness testified to later on, they may have a chance to call it to the court's attention and comment on it.

Go ahead.

Mr. Halle: Then I go over to page 28. [414]

(Whereupon counsel resumed the reading of the deposition of Peter Maitland as follows:)

“Q. You mentioned, Mr. Maitland, that you succeeded in interesting some automobile manufacturers in using the plastic frames made by the plaintiff as original equipment, but that you did not sell them. A. That is right.

Q. Can you explain the reason for that?

A. Yes.” [415]

* * * * *

(Deposition of Peter M. Maitland.)

A. Yes. Primarily, it is the added cost of our red plastic hold-downs as against the metal frame that the manufacturer uses on his original equipment.

Q. Are there any other reasons?

A. No, that was the main reason.

Q. Did you ever try to sell these frames to the Government? A. I did.

Q. Was the Government interested?

A. Yes.

Q. Were they sold to the Government?

A. No.

Q. Why was that?

A. Because we refused to waive our patent rights which the Government wanted us to do, feeling that even [415] though we were losing a great dollar volume of business, that in the long run we would be better off to maintain our patent rights rather than accept that business at that time."

Mr. Halle: Now, your Honor, I am going to read—unless there is anything you want to read from there?

Mr. Kirschstein: No.

Mr. Halle: I am going to read from the deposition of Augustine L. Colarusso, taken February 27, 1958. This is No. 59 for identification.

The Court: I don't remember; did the other side read any of that?

Mr. Halle: I don't believe so.

Mr. Caughey: No, sir.

The Clerk: Two persons are in that deposition. Morton Bean was the one read previously.

What is this name?

Mr. Halle: Colarusso.

The Court: This one has not been read?

Mr. Halle: No, you have not heard from this one, your Honor.

The Court: All right. Go ahead.

Mr. Halle: On page 44, by Mr. Kirschstein:

(Whereupon counsel commenced the reading of the deposition of Augustine L. Colarusso as follows:) [416]

DEPOSITION OF AUGUSTINE L.
COLARUSSO

“Q. (By Mr. Kirschstein): State your name, age, and address, please.

A. Augustine L. Colarusso; age fifty-four; address, 6 North Hudson Street, Boston, Massachusetts.

Q. What is your present occupation, please?

A. I am vice president in charge of research and development in the Van Brode Milling Company, Clinton, Massachusetts.

Q. How long have you held that position?

A. Since December of 1956.

Q. How long have you been with Van Brode Milling Company, Inc.?

A. Since July 1947.”

Mr. Halle: Just skip a question.

(Whereupon counsel resumed the reading of

(Deposition of Augustine L. Colarusso.)

the deposition of Augustine Colarusso as follows:)

“Q. Are you familiar with the subject matter of this case? A. Yes.

Q. Are you familiar with the plastic battery hold-down frame put out by your company?

A. Yes.”

Mr. Halle: Turn to page 72, please, down toward the [417] bottom of the page.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

“Q. Are you familiar with the material that you use? A. Yes.

Q. What material do you use?

A. At the present time?

Q. Yes.

A. We are using a Bakelite material designated as 2155. I think there are three letters——

Q. Would that be TMD-2155?

A. Yes. And a Monsanto material designated LHR, and I think it is changed now to another identification which I do not remember. The purchasing agent would know that. But it is a Monsanto material.

Q. Is there any other material that your company uses in molding the frames at this time?

A. No.

Q. When did you first start using the materials that you mentioned?

(Deposition of Augustine L. Colarusso.)

A. Well, Bakelite material was the only material used in approximately — back in approximately 1952. At a later date, and I believe the following year, the Monsanto material was incorporated in the formulation.

Q. And these two materials are blended to make the [418] frame? A. Yes.

Q. Were you consulted in 1952 before this Bakelite material was first used? A. Yes.

Q. Do you recall who you consulted with?

A. Well, being in the position as technical director at that time and also checking on quality control of materials, I know that we were having some difficulty with the composition used at that time—production difficulties.

Q. What material did you use at that time?

A. Well, prior to Bakelite, we were using the composition known as the Darex Copolymer Number 3, and Polystyrene and a filler.

Q. What type of filler did you use?

A. It was—it came in the classification as a clay.

Q. Did you have any discussion concerning the use of that original material with anyone at your plant?

Mr. Kirschstein: Could you narrow that down as to when you mean?

A. Yes. I am just trying to figure out here—

Q. When did your company first start producing battery frames? A. I don't remember.

Q. I believe we have an exhibit in evidence in the

(Deposition of Augustine L. Colarusso.)

[419] case showing a purchase of a mold from Kas-kadusa Molding Company?"

Mr. Halle: That was withdrawn.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

"Q. I show you Defendants' Exhibit L for identification and just ask you to look it over, to refresh your recollection as to various dates. (Exhibit handed to witness.)

I also show you a copy of Defendants' Exhibit O for identification and ask you to look at that and note the dates."

Mr. Kirschstein: These exhibits are not marked in this case, are they?

Mr. Halle: No, they are not marked in the case.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

"Q. Surely.

"The Witness: May I look at that at the same time?

"Mr. Halle: Right. Here is Exhibit O (handing to witness.)

Q. (By Mr. Halle): After looking at those two exhibits, does that refresh [420] your recollection as to when you first discussed the material for a plastic battery hold-down frame to be manufactured by the plaintiff, Van Brode Milling Company?

(Deposition of Augustine L. Colarusso.)

The Witness: I do.

The first time that I discussed materials pertaining to battery hold-down frames was when Coleman asked me whether polystyrene could be blended with a particular material which he had in a cigarette case—with a material that formed a cigarette case that he had.

Q. When was that; do you recall?

A. I don't remember.

Q. If Mr. Coleman testified that that was some time in the early part of 1951, would that serve your recollection?

A. That sounds approximately right.

Q. Do you remember the plastic cigarette case that he showed you?

A. Yes, I have some recollection of that now.

Q. What did that look like?

A. It was a case in which a common ordinary pack of cigarettes could be put into.

Q. Did you note the material that the case was made out of?

A. The material was marked "Darex"; that is all that I remember of it now. [421]

Q. Did you do anything with reference to that cigarette case, after he showed it to you?

A. I talked with a technical sales representative from Dewey & Almy—I believe his name was Carl Fox—at the time and I asked that specific question of Coleman, and he told me that polystyrene would blend with Darex copolymers.

Q. Have you seen Carl Fox since then?

(Deposition of Augustine L. Colarusso.)

A. Not—I saw Carl Fox maybe twice—I don't remember exactly—and he left the company at that time, shortly after that.

Q. You don't know where he is now?

A. No, sir.

Q. As a result of that conversation, did you order some material from Dewey & Almy Chemical Company?

A. No, not immediately. I gave Coleman the answer and it was sometime after that that I told Dewey & Almy to make up a formulation for us, based on information submitted to me by Mr. Coleman."

Mr. Halle: Will you kindly turn to page 97, about the middle of the page?

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

"Q. Let's get back to the materials that the Dewey & Almy Company mixed for you on an experimental [422] basis, and I take it that was some time between January and July of 1951; am I correct? A. Some time about that period.

Q. After Dewey & Almy made these experimental mixtures for you, am I correct in saying that they never again mixed anything for you, but they just sold you their trade-marked articles, such as Darex copolymer No. 3? A. Yes."

Mr. Halle: Page 99, bottom of the page.

(Whereupon counsel resumed the reading of

(Deposition of Augustine L. Colarusso.)

the deposition of Augustine Colarusso as follows:)

“Q. What did you do with the Darex copolymer No. 3 that you ordered on October 15, 1951?

A. I believe that went to Stedfast Rubber Company for compounding with the other ingredients in the formulation of the battery hold-down.

Q. Aside from you, personally, did your company try to mix Darex No. 3 with the other ingredients, after they had received the experimental mixtures?

A. No; we did not have the necessary equipment to effect such compounding.

Q. Do you know of a company called Marine Plastics? A. Yes.

Q. Did your company send Darex No. 3 to them to mix [423] with the other ingredients?

A. Darex No. 3 was mixed with the other ingredients in the formulation in a mechanical manner, and sent to Marine Plastics for compounding and coloring.

Q. What do you mean by “compounding”?

A. In order to effectively blend into an alloy the ingredients which go into the formulation of the battery hold-down material, they have to be pressed through heated calendaring rolls, and then, because of the heat, and some other plasticizing taking place in that compounding, the materials would finally take on the form of a homogeneous mixture and would come back to us in slab form, which we sub-

(Deposition of Augustine L. Colarusso.)

sequently ground to the proper particle size necessary for injection molding.

Q. Then you would take those ground particles and put them in the mold and make battery frames? A. Yes."

Mr. Halle: Page 103, down toward the bottom.

(Whereupon counsel resumed the reading of deposition of Augustine Colarusso as follows:)

"Q. Is it not a fact that shortly thereafter you changed over to a material from the Bakelite Company? A. Yes.

Q. In making that change-over, were you consulted? [424] A. Yes.

Q. Who consulted with you?

A. I believe it was both Sid Coleman and Robert Crossley, or Sid Coleman talking to Robert Crossley, and finally Robert Crossley consulting me. It worked in about that manner.

Q. Do you recall the conversation you had with Robert Crossley?

A. In a general way, it was that complaints had come in that some of the battery hold-downs were breaking. He also told me that the injection molding department told him that the material didn't always mold exactly as it should, and Bob also thought that since we didn't have the necessary equipment for compounding, it would be nice if we could find a material which would do equally well as a battery hold-down from the present available resins on the market at that time.

(Deposition of Augustine L. Colarusso.)

Q. How did you select the Bakelite material?

A. From time to time manufacturers of plastic items inform prospective customers of new materials which they are either experimenting with or are manufactured products, or, shall I modify that, manufactured resins. They also submit samples for us to evaluate, to possibly find applications for their products; also send literature showing the various physical and chemical properties of these materials. [425]

The literature concerning these materials usually comes to my attention, and in evaluating the literature, which I usually do with all types of new plastic materials, I noted that the Bakelite material—I don't recall the number of it—which later was——

Q. Could it have been BMSQ 2155?

A. I wouldn't remember—which later was identified as 2155, with some letters — TMD 2155 — that this material possessed physical properties which are equivalent to our mixture of Darex Copolymer 3, polystyrene, et cetera.

I then asked Bob Crossley to get a sample for me and we made battery hold-downs from that material. I tested the hold-downs in the laboratory and I then authorized the purchase of the Bakelite material to be used in the manufacturing of battery hold-downs at that time."

Mr. Halle: Please turn to page 108.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

(Deposition of Augustine L. Colarusso.)

“Q. Did there come a time when you changed your formula to include Monsanto material in addition to the Bakelite material? A. Yes.

Q. Was that shortly after you took on the Bakelite [426] material?

A. That was not shortly after; it was quite some time. It could be several months.

Q. Do you recall having a discussion with anyone concerning the addition of the new material?

A. Yes.

Q. With whom did you have that discussion?

A. I believe I discussed the addition of this material with Robert Crossley. I think I told Sid Coleman about it, and I talked with Max Anritter, the molding room superintendent, about that.

Q. What discussion did you have with Crossley about it?

* * * * *

A. The discussion was along this line——

* * * * *

A. There is an improvement on the product by the addition of this Monsanto material, and if we want to stop there, all well and good. But that is generally the reason why I decided to use the Monsanto material, plus the fact that it was a little bit cheaper and would bring the cost of the materials down somewhat without affecting the practical usage of the finished item.

Q. Are you familiar with the ingredients of the Bakelite material?

A. No, sir. I guess that is a trade secret. [427]

(Deposition of Augustine L. Colarusso.)

Q. But at least you do not know it?

A. I don't know it."

Mr. Halle: Kindly turn to page 115.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

"Q. Did there come a time when it was generally brought to your attention by the sales representatives of various plastic powder suppliers that there was a new development in high impact polystyrene?

A. Yes.

Q. When was that?

A. This is done every time they have a new product which either is classified in the group of high impact materials or medium impact materials or other type of materials. The information is always, or usually, submitted to us for evaluation or possible application for anything that we may have in mind." [428]

* * * * *

The Court: All right. Go ahead.

Mr. Kirschstein: On page 120, the second to last line.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

"Q. Did you ever hear of mixing polystyrene with a copolymer comprising Buna S before Mr. Coleman asked you whether polystyrene could be mixed with Darex material? A. No.

(Deposition of Augustine L. Colarusso.)

Q. You never heard of it? A. No."

Mr. Kirschstein: Page 124, the first question on the page.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

"Q. Can you tie down when you first became familiar with high impact polystyrene as such?

A. As far as I can remember now, it was about the time that I discovered the Bakelite material.

Q. You mean when you saw their brochure on it?

A. Yes, because I didn't know too much about plastics, and as the weeks went on I was learning, because I knew this was going to be part of our business." [429]

Mr. Kirschstein: Now on page 78.

The previous questions were about ordering some material based on information submitted to the witness by Mr. Coleman. I am taking up where Mr. Halle left off. The last question on the page.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

"Q. What was that information?

A. He gave me some proportions of Darex copolymer and polystyrene that should be mixed together, and he also wanted to add an inert material for cost purposes, because of the low cost of the inert material, if it didn't affect any other proper-

(Deposition of Augustine L. Colarusso.)

ties. And that is the time that I—I don't recall whether it was I directly or with the aid of our purchasing agent—got Dewey & Almy to make up the first batch of material to be tested for battery hold-downs.

Q. When you talk about inert material, is that what you refer to as a filler?

A. As the filler, yes.

Q. Did Dewey & Almy mix a complete molding powder for you at that time? A. Yes.

Q. Including polystyrene? A. Yes.

Q. Did you try that powder out? [430]

A. I did not try it out. It was either tried out by Max Antritter, with Sid Coleman, or with Sid Coleman and somebody down in the injection molding room.

Q. Was that material satisfactory?

A. Yes.

Q. Do you know what was in it? A. Yes.

Q. What?

A. Well, I don't know whether I—

There was Darex copolymer 3, polystyrene, a clay, and a small amount of wax for lubricating purposes, just for the molding purposes, not in any way affecting the properties of the compound.

Q. I show you Defendants' Exhibit L and ask you to look at a letter contained therein, dated October 15, 1951, signed by Robert F. Crossley, Purchasing Department. (Exhibit Handed to Witness.) A. Yes.

Q. You have looked at that letter? A. Yes.

(Deposition of Augustine L. Colarusso.)

Q. Is the material asked for in that letter the same material that you just described to me?

A. The one I referred to, Darex material?

Q. That is right. A. Yes.

Q. What I am trying to specifically get at is [431] whether the order for Darex No. 3 included the material mixed with polystyrene and clay, as you have testified to?

A. This—not in this purchase order, it doesn't specify. We are specifically asking for Darex copolymer No. 3. It has nothing to do with the compound which we call the battery hold-down material.

Q. By "the battery hold-down material," you mean—— A. The complete mixture.

Q. ——polystyrene, plus Darex No. 3, plus clay?

A. Yes.

Q. So this material ordered on October 15, 1951, did not include the complete mixture that you have already testified to? A. Yes.

Q. It did not? A. It did not.

Q. Are you quite certain that the first material you received from the Dewey & Almy Company was a mixture of polystyrene, Darex No. 3 and clay? A. No, sir; that is not true.

I said when they made a composition for us, that I know definitely. But the first material we ever received from Dewey & Almy was samples of their various copolymers.

Q. Did you receive any technical information along with those samples?

(Deposition of Augustine L. Colarusso.)

A. Yes, their brochure sheets accompanying.

Q. Do you have a technical bulletin for Darex No. 3? A. Did we have then?

Q. Yes. A. Yes.

Q. Did you also have a technical bulletin for Darex copolymer X-34? A. Yes.

Q. And X-43? A. Yes.

Q. I am not quite sure so far from your testimony as to whether you meant that Dewey & Almy made a mixture for you, or whether they merely supplied you with their own products?

A. They first supplied Van Brode Milling with samples of their various copolymers, along with technical bulletins.

Later, when I had a formulation for somebody to develop, I asked whether Dewey & Almy could do that for us on an experimental basis, and they did.

Q. I take it that that was a formulation that you made up in your laboratory?

A. That Mr. Coleman gave me.

Q. Was it written down on a piece of paper?

A. No, I think he told me the formulation, and I wrote it down, I imagine, on a piece of paper."

Mr. Kirschstein: I am stopping on line 7 of page 83.

Now going to page 101.

We are talking about the making up of the molding powder with Darex No. 3 and polystyrene. Beginning on the fourth line:

(Whereupon counsel resumed the reading of

(Deposition of Augustine L. Colarusso.)

the deposition of Augustine Colarusso as follows:)

“Q. Do you know anything about the molding process of putting the ground particles into the molds?

A. What I know about that process is purely observation. The materials are generally loaded in a hopper; they are fed into the machine; they are heated to a given temperature; and by pressure they are forced into the cavity of a mold so designed as to produce the finished product.

Q. Did you first send the material to Stedfast Rubber Company and then the same material to Marine Plastics; were those two different processes?

A. No. The reason why we changed from Stedfast to Marine was because it was more convenient for us, since Marine was located within the Clinton area, and Stedfast was at least 40 miles away. And we knew that Marine had the type of equipment which could be used in compounding the ingredients which went into the formation of the battery hold-down.” [434]

Mr. Kirschstein: Page 103, line 9.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

“Q. I am not asking you whether the 43 did; I am asking you whether your company was still looking for materials for the battery hold-down frame?

A. No, sir. We felt we had an excellent prod-

(Deposition of Augustine L. Colarusso.)

uct, as I remember, from the materials that were made from the processing mixture made for us by Dewey & Almy Company."

Mr. Kirschstein: "43" refers to another copolymer.

Page 123, line 9.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

"Q. Was the plastic battery hold-down made with polystyrene and the Darex Copolymer No. 3 a good commercial product? A. Yes.

Q. Was there any difficulty with it, other than the problem of getting the proper chemical means of getting it mixed?

A. We had no problems when Dewey and Almy made the first material. We had no problems when Stedfast Rubber made the compound for us. We experienced problems during [435] the time Marine Plastics did the compounding.

Q. You testified about the selection of materials from Bakelite and Monsanto. Am I correct in stating that that was concerned with the question of production after you had a commercial frame on the market for some time?"

Mr. Halle: I object to that as leading, your Honor.

The Court: Go ahead. Overruled.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

(Deposition of Augustine L. Colarusso.)

"A. Yes."

Mr. Kirschstein: That's all.

Mr. Halle: I would just like to read at page 103 where Mr. Kirschstein stopped reading. The last question there was where the witness said they felt they had an excellent product from Dewey & Almy Company. The next question.

(Whereupon counsel resumed the reading of the deposition of Augustine Colarusso as follows:)

"Q. Is it not a fact that shortly thereafter you changed over to a material from the Bakelite Company? A. Yes." [436]

* * * * *

(Whereupon counsel commenced reading the deposition of Daniel P. Phillips as follows:)

DEPOSITION OF DANIEL P. PHILLIPS

"Examination by Mr. Halle:

Q. State your name and address.

A. Daniel P. Phillips, 211 Lenox Avenue, South Orange, New Jersey.

Q. Are you presently employed by the Bakelite Company, a division of Union Carbide and Carbon Corporation, with offices at 30 East 42nd Street, New York, New York? [442] A. Yes.

Q. What is your position with the company?

A. Assistant Sales Manager of molding material.

Q. I hand you Defendant's Exhibit M for identification, which was supplied to me by the attorneys for the plaintiff, Van Brode Milling Company,

(Deposition of Daniel P. Phillips.)

to show when the first shipments of bakelite material was made to this company, and as part of that Exhibit there is an invoice of the Bakelite Company, shipper's order number 454475, date shipped 6-18-52, for a quantity of BPSQ155. Is that a material produced by the Bakelite Company?

A. Yes." [443]

* * * * *

"Q. Was the material designated as BPSQ155 available for shipment on order for any of your customers on or after July 25, 1951?

A. Yes."

* * * * *

Mr. Kirschstein: Starting at the bottom of page 4, line 25:

(Whereupon counsel resumed the reading of the deposition of Daniel Phillips as follows:)

"Q. You said that you made a search of the records. Did you make that search personally?

A. No. I did not.

Q. You yourself did not examine the records?

A. No.

Q. Then what you testified to is information that was told to you, is that correct?

A. That is correct." [444]

Mr. Kirschstein: Page 9, line 5.

(Whereupon counsel resumed the reading of the deposition of Daniel Phillips as follows:)

"Q. How long have you been with Bakelite?

A. 19 years.

(Deposition of Daniel P. Phillips.)

Q. Do you have anything to do with the shipping out of the samples? A. Upon occasion.

Q. Did you ever see any samples shipped out?

A. No.

Q. You didn't see any samples of this material that you have been talking about being shipped out, did you?

A. I was not concerned with management at that time. I was a salesman covering a different territory at that time.

Q. In other words, your testimony regarding the fact that samples went out, if they did and when, is based on what you were told by someone, is that correct?

A. And upon records that I have seen.

Q. What records were those?

A. A copy of his sample order shipping papers.

Q. When did you see that?

A. During the week of March 3.

Q. You mean this year?

A. Yes, 1958. May I correct myself? I am in error. [445] I did not see that sample order. I was thinking of something else.

Q. Then your testimony is based on what you have been told?

A. That is correct."

Mr. Kirschstein: Now, going further down on the page. I will continue.

(Whereupon counsel resumed the reading of the deposition of Daniel Phillips as follows:)

"Q. Would you tell us what you did to get the

(Deposition of Daniel P. Phillips.)

information you told us about today after you were notified that you would be examined as to the particular information sought?

A. We have consulted our development laboratory reports to obtain all possible information along the lines requested.

Q. And this record of the shipment of samples, where is that kept?

A. That would be kept at Bound Brook, New Jersey.

Q. And did you contact Bound Brook by telephone? A. Yes.

Q. And did you talk to somebody there?

A. Yes.

Q. Who did you talk to?

A. Mr. P. B. Potter. [446]

Q. Is he a person in charge of the records out there?

A. He is in the supervisory capacity in our development department.

Q. And did you ask him to look up these records for you? A. Yes.

Q. And as the result of that did he give you some information?

A. He had one of his men telephone me back and provide the information.

Q. And that is the information you have been testifying to today? A. Yes."

Mr. Kirschstein: Your Honor, I submit that on this basis this man's testimony is purely hearsay. It is not even based on his own inspection of rec-

(Deposition of Daniel P. Phillips.)

ords, it is not even based upon the inspection—on what was told him by the man who inspected them; it is based on what——

The Court: What significance is there? He is merely testifying as to a shipping date.

Mr. Kirschstein: I submit, your Honor, that that date is not established by this testimony.

Mr. Halle: May I read the colloquy that ensued, [447] your Honor? It is just about a page.

The Court: Yes.

Mr. Halle: (Reading.)

“Mr. Halle: Mr. Kirschstein, are you objecting to this on the ground that it’s not the best evidence?”

“Mr. Kirschstein: I will make any objection I have when the testimony is offered.

“Mr. Halle: I am in a position now to get to the original records if I have to and if you will make such objection I will do what I can to get the records. However, I am not going to wait until the trial of these issues to have you raise that objection and I state that I will consider you waive the objection unless you specifically make it now.

“Mr. Kirschstein: You can consider it so but I hereby state I am not waiving any objections except as the court may hold at the trial according to the law.

“Mr. Halle: But you are not making any objection as of this moment?”

“Mr. Kirschstein: At this moment I have not put in any objection.

“Mr. Halle: That’s all.”

(Deposition of Daniel P. Phillips.)

Mr. Kirschstein: Your Honor, I am not objecting on the ground it is not the best evidence; I am objecting on the ground this testimony is purely what somebody else told somebody else over the telephone. [448]

The Court: An offer was made at the time to produce the documents as things kept in the regular course of business. The offer was not accepted. In view of that I will overrule the objection.

* * * * * [449]

Mr. Kirschstein: In view of the fact that the testimony is being allowed in, I would like to read one further part.

The Court: All right. Go ahead.

Mr. Kirschstein: Page 5, line 8.

(Whereupon, counsel resumed the reading of the deposition of Daniel Phillips as follows:)

“Q. When you send samples of a product out to customers at that time in the manufacturing product, would I be correct in stating that when the product is a quite new one it's just the beginning of it in your line? A. Yes.

Q. So when you send samples out you are not in commercial production, are you, for ordinary volume of shipment to customers, are you?

A. We are also sending out samples after we are in production.

Q. In July, when you sent out samples of the material you have been talking about, were you in commercial production then? A. No.

Q. Is it customary for Bakelite to put out bro-

(Deposition of Daniel P. Phillips.)

chures on their materials when the materials are in the regular line? A. Yes.

Q. When are those brochures put out with relation to [450] the time that the material has been in the line? A. No specific time.

Q. Is putting out these brochures one of the ways of making your products commercially known?

A. Yes.

Q. Do you know when the first brochure regarding the material you have been talking about was put out? A. Yes.

Q. When was that?

A. We have searched our records and up to the present time the earliest brochure that we have found is dated May 20, 1952. This was forwarded to our salesmen for transmission to the customers."

* * * * * [451]

(Whereupon counsel commenced the reading of the deposition of Sidney Coleman as follows:)

DEPOSITION OF SIDNEY COLEMAN

"Q. (By Mr. Halle): What is your name?

A. Sidney Coleman.

Q. What is your address, Mr. Coleman?

A. 38 Acton Street, Maynard, Massachusetts.

Q. What is your connection with the plaintiff?

A. I am an independent director of sales or sales counselor.

Q. What are your duties as such?

A. I handle the sales through my associate

(Deposition of Sidney Coleman.)

members of my own organization to sell and promote and originate and design, if possible and what not, for the Van Brode Milling Company—Van Brode Sales Company, which formerly was Van Brode Milling Company.”

Mr. Halle: Please turn to page 7, down toward the bottom of the page.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

“Q. I hand you Defendant’s Exhibit A for identification which was marked at Mr. Fritsch’s examination previously, and ask you if that is a patent which your name appears as the inventor? [452]

A. Yes, sir. It is.”

Mr. Halle: Sir, that is the suit patent, that exhibit.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

“Q. In reference to the invention contained in the patent, Exhibit A, when I use the word invention I am not conceding that there is an invention, I am just using it for purposes of talking about the patent, Mr. Coleman? A. Yes.

Q. In reference to that invention, did you make sketches concerning that hold-down frame prior to applying for the patent?

A. I made a wooden—I made a wooden sample that was adhered to with an adhesive.

Q. Aside from the wooden sample, did you make any sketch on paper? A. No.

Q. Or any other material? A. No.

(Deposition of Sidney Coleman.)

Q. Did you make a written description of the invention? A. No. I didn't." [453]

Mr. Halle: Page 15, please.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. What was your next step?"

The Court: I suppose disclosure to his patent lawyer.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"A. Well, I was a little bit undecided. I knew I had to do something to strengthen the polystyrene, because that was material that was priced properly to bring out the item at the price that I needed and wanted, and I just didn't know what to do about it immediately and kept mulling it over and thinking about it, and one day I walked into the laboratory and I saw on one of the assistants—one of the men that worked in the laboratory—I saw a sample of a cigarette case. I picked it up and felt it, and it seemed to have what I was looking for. I immediately instructed to get me some of this material.

Q. What material was that?

A. It was marked on the case—I didn't know who it came from. It was marked on the case Darex number 3. The thing that determined me asking for this material was—it is common practice in the plastic business to determine what plastic is made of is to take a match and hold it to the [454] plastic and burn it and you can tell

(Deposition of Sidney Coleman.)

from the odor what it contains. I smelt rubber in the Darex container, which is the reason I asked for the material.

Q. Do you have any professional training as a chemist, Mr. Coleman?

A. No, sir. I have no professional training as a chemist.

Q. Do you, in any way, hold yourself out as an expert on chemistry?

A. No, sir. I do not. I am a layman."

* * * * *

"Mr. Halle: * * * Have you made any research or gained any experience or knowledge from sources other than the cost price of the market or from the materials that you saw in other products?

The Witness: I would say that working with an item, being of a curious nature, I naturally learned the characteristics of plastics.

Q. Tell me how you do that? [455]

A. Well, I knew that polystyrene was brittle. I knew that polyethylene could be used for manufacturing squeeze bottles and things that were soft and was flexible. This was the extent of that particular specific knowledge that I might have.

Q. Was that the knowledge that you had in January and February of 1951?

A. That's right.

Q. Nothing further than that?

A. That's right.

Q. After you discovered the cigarette case with the name Darex on it, what did you do?

(Deposition of Sidney Coleman.)

A. I instructed them to get me some of this material.

Q. Who was them?

A. The purchasing agent.

Q. Would that be the purchasing agent of Van Brode, Mr. Coleman? A. Yes.

Q. What was his name?

A. Robert Crossley.

Q. Is he still employed by Van Brode?

A. He is.

Q. Did the purchasing agent obtain a quantity of Darex? A. Yes. [456]

Q. Is this a powder? A. Yes. It is.

Q. Did he obtain a quantity of powder for you, Mr. Coleman? A. Yes. He did.

Q. Was it delivered to you personally?

A. No. It was delivered to the plant.

Q. What did you do? Did you do anything with that powder thereafter? A. Yes. I did.

Q. What did you do?

A. I told them to mix that with polystyrene, the greatest quantity to be polystyrene and I wanted to add this Dewey & Almy copolymer number three.

Q. Darex number 3?

A. Darex number 3 to the polystyrene to see if I could get the characteristics that I had to have.

Q. Who is them, when you say, I told them?

A. People in the laboratory.

Q. Do you know the names?

(Deposition of Sidney Coleman.)

A. Yes. I know the first name of one, and I know the last name of one.

Q. Give us what you know?

A. Yes. Paul something or other and Gus Colarusso." [457]

Mr. Halle: Next page, the second question.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. It was yourself and Paul and Gus Colarusso, is that right?

A. Well, they weren't in it, they were just told what to do, they didn't even know what I wanted the material for originally.

Q. Did you have the model at that time?

A. Yes. I had the model.

Q. Did you tell them to put it into the mold, Mr. Coleman?

A. No. I told him to mix the powder thoroughly, then I authorized—I told him to give it to Max Antritter and have him give me some samples."

Mr. Halle: Down at the bottom of the page.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. Then he caused it to be put into the mold?

A. That's right.

Q. By a usual molding process made into a frame, is that right? A. That's right.

Q. Is there anything new about that process, Mr. [458] Coleman? A. The molding process?

Q. Yes. A. No.

(Deposition of Sidney Coleman.)

Q. You are not claiming that as your invention, is that right? A. No.

Q. When was that done?

A. That was done in February.

Q. Some time in February, 1951?

A. That's right.

Q. Do you know what proportions they mixed at that time?

A. I told them to have the majority of the material polystyrene, and not to add a teaspoon, but to give me a good chunk of it in there because I wanted to see if I wouldn't modify the polystyrene."

Mr. Halle: Then Mr. Kirschstein said:

"What is that?"

And the witness continued:

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"A. (Continued) A chunk of Darex number 3. I didn't specify so much of this and so much of that.

Q. Do you have any idea of what was the approximate [459] proportions that they mixed?

A. That the approximate proportions were—I had no idea—no exact figure. I had three or four batches made. There were some with more Dewey added and there were some with less Dewey added.

Q. You mean, Mr. Coleman, some were 50% of the copolymer?

A. The greatest majority at all time was polystyrene. I insisted on that.

Q. Can you give us an approximate percentage

(Deposition of Sidney Coleman.)

of polystyrene when you talk about greatest majority?

A. It was arranged in which it was used—I don't know.

The Witness: Can I speak to the attorney about this. I don't know whether that is to be disclosed or not, because that is a company secret.

Q. You are claiming the exact or the approximate proportions as a trade secret?

A. That's right."

Mr. Halle: Then Mr. Kirschstein said:

"I would say the exact proportions right now may be a secret. I don't think Mr. Coleman is in a position to know what the company claims." [460]

* * * * *

"Mr. Kirschstein: You can tell him the approximate amount of polystyrene at the beginning if you know it. Is that what you want to know?

"Mr. Halle: That is one thing I would like to know.

"A. The maximum amount that was used was 80-20. 80% polystyrene and 20.

Q. What was the minimum amount that was used, Mr. Coleman?

Mr. Kirschstein: Again, if you recall.

A. The minimum amount used was 12% Darex and 88% polystyrene.

Q. So the maximum and minimum ranges were 80-20 and 88-12? A. That's right.

Q. With the greater amount in each case being polystyrene? A. That's right.

(Deposition of Sidney Coleman.)

Q. Is it present company policy to claim the proportions as a trade secret?"

Mr. Kirschstein: I think we ought to read the colloquy there.

Mr. Halle: I will read the entire colloquy.

(Whereupon counsel resumed the reading of the [461] deposition of Sidney Coleman as follows:)

"Mr. Kirschstein: Could I please have that question again?"

(Reporter reads back the last question.)

Mr. Kirschstein: You mean the proportions of the present compound that they make.

Mr. Halle: That they make under this invention.

Mr. Kirschstein: I mean do you want the proportions of the product that is sold today?

Mr. Halle: Yes. Under this patent.

Mr. Kirschstein: Yes. He is not going to disclose what their exact proportions are today.

Mr. Halle: I don't want the proportions. I want to know whether they claim that as a trade secret?

Mr. Kirschstein: You are asking him whether they claim it as a trade secret?

Mr. Halle: Yes.

Mr. Kirschstein: Let us put it this way.

Mr. Halle: Go ahead.

Mr. Kirschstein: Off the record.

(Off the record discussion.)

(Deposition of Sidney Coleman.)

Mr. Kirschstein: If you know tell him what the proportion now is.

The Witness: I am not a 100% sure, because I am not—— [462]

Mr. Halle: I didn't ask him about the proportion. I want to know what the company is claiming as a policy, as a trade secret?

The Witness: I do not believe the company is claiming it as a trade secret.

Q. I would like to know what proportions you use today?

A. That I am not qualified to answer.

Q. Is it somewhere near the range that you have already testified to?

A. It's in the range that we have specified in the patents."

Mr. Kirschstein: Are you going to read the next?

Mr. Halle: Mr. Kirschstein said:——

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Mr. Kirschstein: You mean the range as specified this morning, don't you?

The Witness: Yes, sir. Of which we are talking about here now.

Q. When did you make, what you considered, your first successful frame?

A. In February, 1951.

Q. What was the range for the successful frame, Mr. [463] Coleman?

A. It was, if I remember, within that range.

(Deposition of Sidney Coleman.)

We had hold-downs made of anywhere from 80-20 down to 88-12 were successful frames.

Q. Yes.

A. Had the characteristics that I needed and required."

* * * * *

"Q. Do you know that the first mold for the battery frame was made by the Kaskadusa Tool Company? A. Yes, sir.

Q. Do you know when that mold was ordered?

A. I think it took four or five weeks prior to when we went in and made the first sample, and I think—I would say it was made right after the first—the order was placed right after the first of the year, however the purchasing agent would give you the exact date."

Mr. Halle: Kindly turn to page 37, the question just above the middle of the page.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. Would it be a fair statement to say that the wood sample was similar to the drawing on the patent, Mr. Coleman? A. Yes.

Q. And it had those little triangular corners on that? A. Yes.

Q. You have no claim that that wooden sample is your invention? A. No."

Mr. Halle: Page 39, please, line 7.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. I believe you told us that until production

(Deposition of Sidney Coleman.)

started and sales were made in 1951, and that is the point we have come to at this time, you used no other copolymer powder for the polystyrene than the Darex? A. That's right.

Q. You experimented with no other powder, is that right? A. That's right."

Mr. Halle: Down to line 21.

(Whereupon counsel resumed the reading of the [465] deposition of Sidney Coleman as follows:)

"Q. After October of 1951 did you try the product of another company?

A. I did that, sir.

Q. When was that?

A. The exact date I don't know, but I started to experience some trouble with the hold-downs. We could not successfully mix the powder ourselves, and when I say successfully mix, I mean get it thoroughly mixed within the two powders, and Dewey & Almy did not have the facilities or would not undertake to mix the powders for us.

Q. When did they then inform you of that?

A. They informed us of that and—let's say—I would give a guess—March.

Q. Of 1952? A. Of 1951.

Q. 1951?

A. When we first bought the powder from them.

Q. I see.

A. When I started to have some problems with the hold-downs, that they weren't being modified a 100%, because of the mixing arrangement that we

(Deposition of Sidney Coleman.)

had in our own plant, we asked them to do it, and they said, they didn't have the facilities to do it and they recommended somebody to do it for us.

Q. Go ahead.

A. We had this somebody else do it for us and it still was not satisfactory for me.

Q. When was that in the point of time?

A. I would say possibly sixty days or ninety days from the first.

Q. From the first frame that was made?

A. That's right.

Q. That would be February, March, or April of 1951?

A. I think it was earlier than that.

Q. March? A. March.

Q. Who was recommended to do the mixing for you, Mr. Coleman? A. Marine Plastics.

Q. Where are they located?

A. In Clinton, Massachusetts.

Q. Did they mix some?

A. They mixed some but they still didn't give me the complete mix that I had to have.

Q. What did you do after that?

A. Then I gave the purchasing agent an order to get me another plastic source of supply that could mix the powder for me, and he came up with two companies that had an equivalent to Darex number 3, each one having a respective [467] name for their—or number for their product.

Q. What were those companies?

A. Monsanto and Bakelite."

(Deposition of Sidney Coleman.)

Mr. Halle: Page 42, line 17.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

“Q. When did you first receive samples of the products that you are talking about?

A. Almost immediately after the request was made.

Q. In March of 1951? A. That's right.

Q. Did you try them? A. Yes, sir.

Q. What did you find?

A. I found that we had a perfect mix, which was something we did not have before.”

Page 44, line 12.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

“Q. But you do not know whether it is the same material, is that right?

A. I'm not a chemist, I have no way of knowing, I had to base on what they told me. [468]

Q. In other words you got a material which made a battery hold-down frame which you considered satisfactory, is that right?

A. That's right.

Q. But you do not know what the material is?

A. I personally do not know.”

Mr. Halle: Page 45, line 13.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

“Q. When was that done?

A. That was done within sixty days from the time we went into production. I think our purchase

(Deposition of Sidney Coleman.)

order will show a delivery of about sixty days after."

Mr. Halle: Page 46, line 14.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. Would that be sixty days after you went into production or sixty days after sales?

A. Sixty days after sales."

Mr. Halle: Line 20.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. Do you mix the Monsanto and the Bakelite or do (you) use them separately?

A. They're used separately.

Q. One run of frames is made with Monsanto and another will be made with Bakelite?

A. To the best of my knowledge."

Mr. Halle: Page 48, line 5.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. You had nothing to do with the development of the Darex number 3?

A. Nothing at all.

Q. Or any Darex product? A. No, sir.

Q. You also had nothing to do with the development of the Monsanto or the Bakelite products?

A. No, sir.

Mr. Halle: Page 49, line 5.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. When we speak of the Darex being unsatis-

(Deposition of Sidney Coleman.)

factory because your company couldn't mix it and then you gave it to the other company to mix and they couldn't mix it, how did [470] that show up in the product? A. We had breakage.

Q. It was not a commercially acceptable product, is that right? A. That's right.

The Witness: Let me clarify that. Where we got a good mix—it was where we got a poor mix, that it wasn't.

Q. When I say commercially acceptable I mean for production?

A. Yes. The way we discovered it—we shipped them out and they came back broken. That's when we started to look for trouble.

Q. But it was not satisfactory for your commercial production? A. That's right.

Q. It was not satisfactory?

A. It was not, because of the mix.

Q. Would I be safe in saying that after October, 1951—I mean December 1951, Darex number 3 was permanently abandoned? A. That's right."

Mr. Halle: Line 13.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. Did either of you or the company have records concerning the history of the changeover from the Darex to the Monsanto and the Bakelite?

A. No. It was done so quickly after the discovery that we were having mixing problems, that there was nothing except my complaint, which you could have heard all over the place.

(Deposition of Sidney Coleman.)

Q. Did Mr. Crossley have any correspondence with Bakelite and Monsanto?

A. No. I believe he called those gentlemen in and orally had them quote—to submit samples.

Q. Did you make any search for records before coming down today? The notice for examination called for production of certain records. Did you make any search for records.

Mr. Kirschstein: I can answer that. He has brought what the company told him they had."

Mr. Halle: Page 52, line 6.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Mr. Halle: I would like to be a little more specific. So far, during the examination of Mr. Fritsch and Mr. Coleman up to this point we have developed no record concerning the production of the invention.

Mr. Kirschstein: There are no experimental [472] records, as I recall according to Mr. Fritsch's testimony or formulas or drawings or the like relating to the development. No lab notes and so on—correspondence between the company, Van Brode, and suppliers of any of this material we have looked for."

* * * * *

"Q. I take it, Mr. Coleman, that you are totally unfamiliar of the chemical formula for any of the materials we have been discussing?

A. I'm not a chemist. I know a little bit more today, of course, than I did when I first got started

(Deposition of Sidney Coleman.)

in the plastic business, but I don't ever make any statement anything further—that I have full knowledge of anything in chemistry. [473]

Q. You could not state any of the formulas to me now, is that right?

A. No. I couldn't. The only thing I could state is that I know Darex number 3 and the equivalents that we are now using contain rubber-synthetic rubber.

Q. You do not personally know of any specifications that Mr. Crossley gave to Bakelite or Monsanto, could you?

A. No. The only instructions that I gave Mr. Crossley was to get me an equivalent, already mixed of what we had with Darex and our polystyrene.

Q. From there on we either have to find out from Mr. Crossley or some other representative——

A. That's right.

Q. Of the company? A. That's right.

Q. Did any of the gentlemen we have already mentioned as having followed your instructions to mix the powders and to put them in the mold, did any of them make any suggestions to you in connection with this invention?

A. They did not, because I didn't even—I happen to be a very strong individual and I would not let them do anything in any direction at all, because I felt I knew what I wanted and I wouldn't let them interfere in any way on it.

Q. Mr. Coleman, do you know what the term

(Deposition of Sidney Coleman.)

high-styrene content means in reference to a butadiene-styrene copolymer? [474]

A. I believe I do. It means that there is lots of styrene in the majority of the material—the majority of the material contains styrene.

Q. When you say majority, would you mean more than 50%

A. This would be what I think is so.

Q. In other words——

A. I have nothing to substantiate. This is just my pure thinking on the thing.

Q. In other words, your pure thinking on the thing, is that right? A. Yes.

Q. Indicated that a high styrene content——

A. Means more than 50%.

Q. More than 50% styrene? A. Right.

Q. Have you ever made any effort to determine whether or not the Bakelite material has a copolymer with either more or less than 50% styrene content? A. No.

Q. Did the plaintiff make any test to determine whether or not the Bakelite product, the copolymer in the Bakelite product contained more than 50% styrene? A. Not to my knowledge.

Q. Would your answer be the same as to the Monsanto product? [475]

A. That's right."

Mr. Halle: Page 64, line 10.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

(Deposition of Sidney Coleman.)

“Q. Getting back to that inorganic filler that is mentioned in the patent, I take it, you never used in a commercial production? A. That’s right.

Q. You don’t know whether the present material you are receiving has an inorganic filler?

A. I, not knowing what the compound is, I don’t know.

Q. You don’t know?

A. But they decided not to use the inorganic filler.

Q. What types of inorganic fillers did you use at the time?

A. We were experimenting with two or three different types. I don’t know what they were.

Q. When was that in point of time?

A. Before we—when I was fooling with the other plastics.”

Mr. Halle: Line 5, the next page.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

“Q. Who did you discuss the inorganic filler with?

A. I discussed it with Mr. Colarusso.

Q. Did you tell him to put in an inorganic filler, Mr. Coleman?

A. I asked him to put anything in that would be necessary, which I didn’t even know what an inorganic filler was. He said he was going to use an inorganic filler. That’s all I knew about it. I didn’t care what he used.” [477]

* * * * *

(Deposition of Sidney Coleman.)

“Q. Did you know that during the progress of this patent prosecution the claims were rejected and it went up to the Board of Appeals of the Patent Office? A. I knew of it.

Q. Were you consulted at that time?

A. No, sir.

Q. Were you consulted at any time thereafter until the issuance of the patent? [480]

A. No, sir.

Q. In connection with the question which your attorney directed you not to answer concerning the ingredients in the properties—— A. Yes.

Q. Do you know the ingredients in the properties which were mentioned by Mr. Herzog in the communication of April 2, 1955?

A. I don't know the exact properties, but I know it contained butane—synthetic rubber with a high styrene content.

Mr. Kirschstein: And polystyrene.

The Witness: Polystyrene—no—not polystyrene—and polystyrene.”

Mr. Halle: Page 114, line 13.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

“Q. As I recall your testimony you mixed some polystyrene and the Darex copolymer number 3 yourself in the laboratory or some was mixed in Van Brode's laboratory, is that right?

A. That's right.

(Deposition of Sidney Coleman.)

Q. Will you be able to mix it, for the purpose of your tests, sufficiently? [481]

A. Yes. We were able to mix.

Q. To get workable frames?

A. We were able to mix a small quantity and we had enough for us to mold enough samples that I could find out whether they were good enough or not.

Q. You could not mix them commercially?

A. No.

Q. Nor would Dewey & Almy?

A. No. Dewey & Almy couldn't mix them commercially." [482]

* * * * *

"Q. Is it correct to say that what you received from Bakelite and Monsanto is a completely mixed powder, Mr. Coleman? A. Yes. It was.

Q. Ready for molding? A. Yes."

Mr. Halle: Page 118, line 8. [484]

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. Darex copolymer number 3—the name Darex copolymer number 3 is a trade name?

A. That's right.

Q. Do you know the general description of that material? A. Yes.

Q. What is that?

A. It's a specific special rubber—synthetic rubber with a high styrene content?

A. What do you call that?

(Deposition of Sidney Coleman.)

A. I think it's called bunadiene or buna S—I'm not sure of that.

Q. When did you first become familiar with that general description, do you recall, generally referring to the year?

A. It was quite a little while before when they went to—when I asked them to get a material that was comparable to Dewey & Almy's material. I then learnt of what Darex number 3 was and also what the competitor's item was made of.

Q. Monsanto and Bakelite?

A. Monsanto and Bakelite.

Q. You testified before that you thought that buna S [485] with a high styrene content would have over 50% of the styrene, is that correct?

A. That's right.

Q. Is that something based on knowledge or is that a guess?

A. That's purely a guess. I have no way of knowing. I took from the high styrene that's what they meant."

* * * * *

"Q. You testified that you did not think that the color scheme on the plaintiff's package and the defendant's package for the battery hold-down frames would trick anybody into buying one frame from the other. Who were the people you were referring to that would not be tricked?

A. The jobber, the wholesaler to whom we solicit their business." [486]

* * * * *

(Deposition of Sidney Coleman.)

“Q. What did you notice as far as returns of broken hold-downs — ratio of returns after you stopped using the Darex copolymer number 3?

A. After we stopped the copolymer number 3 and we had the proper mixture that came to us already mixed up from the factory our returns became nil.

Q. When you say the proper mixture from the factory you are referring to either Monsanto or Bakelite? A. That’s right.”

Mr. Halle: Page 158, line 23.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

“Q. Merchandise of this type is sold over the counter, is that right? A. Yes. [487]

Q. A customer comes in and requests a battery frame, is that right?

A. No. This item is sold by the gas station. A customer doesn’t ask for it. The man who drives his car in doesn’t ask for any particular battery frame.

The Witness: You own a car, don’t you?

Mr. Halle: Yes.

The Witness: You got a metal frame more than likely that came from the car manufacturer.

Mr. Halle: Right.

The Witness: It is not giving you any particular problem.

Mr. Halle: That’s right.

(Deposition of Sidney Coleman.)

Mr. Coleman: If somebody told you why this is better you wouldn't change it.

Mr. Halle: If I were to go to a gas station and the attendant said, "Looks like you need a new battery frame," I say, "Okay put one in."

The Witness: You usually don't specify what kind you want.

Mr. Halle: No. You just wouldn't spend your money like that. He would have to give you a good reason why I should have it. I usually don't ask for a particular brand of battery frame, do I?

The Witness: You don't ask for any. [488]

The Witness: Neither does the other customer.

Mr. Halle: Nobody does.

The Witness: The point of sale is not within the consumer, it's with the dealer. He knows the consumer does not know."

* * * * *

The Court: How much of it do you want to put in?

Mr. Kirschstein: Your Honor, there is a pretty good amount I would like to read, and I would like to read from another deposition which corrects some erroneous impressions created in the parts read.

The Court: Let's finish with this before you go to the other.

Mr. Kirschstein: Yes, your Honor, that is what I meant to do.

I want to request permission to read the parts after I finish reading this, so as to correct this.

(Deposition of Sidney Coleman.)

The Court: That is all right. If they dovetail, it is perfectly all right.

Mr. Kirschstein: Page 12, line 6, start with the answer:—

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

“A. That wooden sample was made in 1950.

Q. 1950?

A. I don't recall the exact date. It was made, as I recall it vaguely, sometime in the early part of 1950.

Q. Did you show it to anyone?

A. Yes. I showed it to Mr. Eric Fritsch.

Q. Did you also show it to Mr. Van Brode?

A. I showed it to Mr. Brode whose office was adjacent to Mr. Fritsch's at the time, and he also saw it.

Q. Do you recall your conversation with Mr. Fritsch at that time? A. I said—

Q. If any?

A. I said, “That there was a great need for some—for a plastic battery hold-down or some hold-down to replace the metal one.” Because having spent 40 years of my life in selling automotive electrical parts I knew of the great need of it.

Q. What did you do after that in connection with that wooden sample?

A. I persuaded Mr. Fritsch to have a sample die made to correspond with my wooden sample.

Q. Did you know when that die was made?

(Deposition of Sidney Coleman.)

A. That die was made in the latter part of 1950 or the early part of 1951. It was either delivered in January [490] or December—I'm not sure.

Mr. Kirschstein: You mean January, 1950?

The Witness: January of 1951 or December of 1950.

Q. When did you make your first battery frame out of plastics?

A. The first one was made in January of 1951, just as soon as I had the die." [491]

* * * * *

"Q. When did you first start using polystyrene, Mr. Coleman?

A. When we manufactured the first hold-down on the polyethylene, it did not have the characteristics that I needed and required. I talked to the molding foreman and told him I wanted a sample made out of polystyrene, which was made for me, and of course they laughed at me at the time, and of course it was very brittle and broke very easily, and it did not have the characteristics that I needed and wanted.

Q. After giving that nice little speech, will you kindly answer the question and tell me when you made it?

A. In January of 1951." [492]

* * * * *

Mr. Kirschstein: Page 31, line 25.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. Mr. Kirschstein has offered the information

(Deposition of Sidney Coleman.)

that you started to produce the frames commercially in August of 1951? A. That's right.

Q. And that the first sales were made in October of 1951? A. That's right.

Q. Did you have anything to do with the further development of the frames, if any, between February, 1951 and August of 1951?

A. Yes. I tested them.

Q. What tests did you subject them to?

A. I put them in a refrigerator and brought them down to a low temperature and hit them with a bar—I subjected them to impact. I also put them on our automobiles and watched the performance of each individual one.” [495]

* * * * *

Mr. Kirschstein: Page 110, line 4.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

“Q. You referred to problems and defects you noticed [496] with metal frames, metal battery hold-down frames. A. Yes.

Q. Would you state what those were?

A. Well, having been in the industry for many years in the electrical field I knew the defects of the metal hold-down and the advantages that one could have if he could correct them.

Q. What were the disadvantages?

A. Well, a metal hold-down is very rigid and digs into the storage battery, corrodes, is a conductor of electricity—

(Deposition of Sidney Coleman.)

Q. Are there any bad effects from the corrosion, Mr. Coleman?

A. And the corrosion that occurs creates a flaking of the corrosion which is picked up by the fan and sulphuric acid is blown all over the automobile, which affects the voltage regulators, the fuel pumps, etc.

Q. Go ahead.

A. A plastic battery hold-down would not adhere to the battery, would be good for the storage battery, would not carry current electrically across the battery, and would expand and contract at the same ratio as the battery itself does.

Q. Go ahead.

A. The battery life is greatly increased with a plastic [497] battery hold-down.

Q. What were the characteristics that you felt the plastic battery hold-down frame had to have?

A. Well, it first had to be flexible and it had to withstand both heat and cold, it had to be strong enough to hold the battery down, and it had to be elastic enough to allow the battery to expand and contract without bringing any undue pressure on the battery and it also had to contain the current electrically.

Q. Within the battery itself?

A. Without allowing it to discharge.

Q. You mean it should not be a conductor of electricity—

A. That's right.

Q. Is that right? A. That's right.

Q. How about the corrosion problem?

(Deposition of Sidney Coleman.)

A. Plastics are non — are impervious to corrosion.

Q. That is what you wanted?

A. That is what I wanted.

Q. I believe that you testified that in the late 40's you had been working at different automotive plastic materials?

A. That's right.

Q. Did you have occasion to familiarize yourself [498] generally and physically with what they were like?

A. Yes.

Q. What did you do with them sometimes?

A. In order to determine what plastic—a unit was made up of we would determine the factor by taking a match and lighting it and applying it to the plastic and determine by the odor what the plastic material was.

Q. Did you ever try to break plastic articles or squeeze them to see what their physical characteristics were?

A. Yes. We did. We knew that polystyrene was very, very brittle. It would break on impact. We knew that polyethylene had a great deal of elasticity and could be squeezed.

Q. These were things you learned in just handling the material?

A. Just by being in the business and being associated with the items.

Q. Did you know that plastic powders were and are sometimes mixed?

A. Yes. I did.

(Deposition of Sidney Coleman.)

Q. Did you know that at the time in the late 40's, Mr. Coleman? A. Yes. I did.

Q. When you, I believe you said, January, 1951, you saw this plastic cigarette case in the Van Brode [499] laboratory—— A. Yes.

A. I believe you testified you handled it, is that right? A. Yes. I did.

Q. What was the significance of your contact with that item?

A. Well, it had tensile strength and it had elasticity and it came to me that this was the thing that I needed to put into the hold-down to give me what I was looking for.

Q. Put into what, specifically?

A. Polystyrene.

Q. What did you do after that?

A. I ran over to Mr. Fritsch and I got all excited like a little boy would. I said, "Eric, I got it." He said, "You've got what?" I said, "I think I've got the answer that I've been trying to get." And I explained to him in detail, and you know how Vice Presidents are—usually very non-committal. They expect guys like me in the sales field to be a little eccentric. He said, "So what?" I said "I want to get some of the material." He said, "Go ahead."

Q. Then you got some?

A. Then I got some.

Q. Where did the polystyrene come from?

A. We had thousands of pounds of it in our plant in [500] the manufacture of other items that we were making.

(Deposition of Sidney Coleman.)

Q. As I recall your testimony you mixed some polystyrene and the Darex copolymer number 3 yourself in the laboratory or some was mixed in Van Brode's laboratory, is that right?

A. That's right."

Mr. Kirschstein: Page 119, line 8.

No. Page 130, line 15.

(Whereupon counsel resumed the reading of the deposition of Sidney Coleman as follows:)

"Q. When did you find that your material expanded and contracted at the same ratio as the substitute hard rubber of the battery case?

A. When it was tried.

Q. Was that——

A. When we put them on test in February of 1951.

Q. February of 1951? A. That's right.

Q. You did not know it before that?

A. No.

Q. What tests did you make to determine that ratio?

A. Well, we made a comparison test. A metal hold-down on a battery six months old or more will dig into the side of the case. A plastic hold-down on a battery will not [501] dig into the side of the case.

Q. What other tests?

A. Those were the only tests.

Q. I take it you took an old battery frame and took the frame off and saw that it dug in and then

(Deposition of Sidney Coleman.)

you took a battery of which you placed one of your frames and you found you didn't dig into it?

A. No. We started with two cars—with two batteries.

Q. Go ahead.

A. One had a metal frame and one had—we put on a plastic frame—brand new automobiles. In three months we saw where the metal frame had dug into the metal case.

Q. Was that one?

A. It was more than one. A dozen in every case, except with very few exceptions.

Q. What were the controls you placed on that test? Who watched the batteries? A. I did.

Q. Where did you keep the batteries?

A. They belonged to employees.

Q. They were not under your constant supervision? A. That's right.

Q. Periodically they were driven in personal automobiles? A. That's right. [502]

Q. What are the names of the employees?

A. I can give them to you.

Q. Will you get me those names?

A. Adolph Wheaty.

Mr. Halle: Would you furnish those names to us, Mr. Kirschstein?

A. Yes. We can give them to you.

Mr. Kirschstein: I will have Mr. Coleman tell me the names and I will furnish them.

Q. Do you know the condition of each one of

(Deposition of Sidney Coleman.)

the batteries when you first started making the tests, Mr. Coleman?

A. We tested them on new automobiles.

Q. Brand new automobiles?

A. That's right.

Q. Brand new batteries?

A. That's right.

Q. How long would you test run?

A. Three or four months.

Q. Three or four months from February, 1951?

A. That's right.

Q. You concluded your test in May or June of 1951, is that right?

A. Not only did we conclude our test—that this is an accepted standard in the industry that can be verified.” [503]

Mr. Kirschstein: Page 137, line 17.

(Whereupon counsel resumed reading of the deposition of Sidney Coleman as follows:)

“Q. Who informed you that plastic powders were being mixed? A. Mr. Colarusso.

Q. That was prior to January 1, 1951?

A. That's right.

Q. When did you first learn that you could mix polystyrene with a copolymer? After buna S?

A. I didn't know that it contained buna S.

Q. You know now, don't you? A. Yes.

Q. When did you first learn that a powder of polystyrene could be mixed with a powder of buna S?

(Deposition of Sidney Coleman.)

A. I asked Mr. Colarusso whether this could be mixed with polystyrene and he said, yes.

Q. He told you that on or about January 1, 1951, is that right?

A. After then, some time in February. Shortly after I saw the cigarette case."

Mr. Kirschstein: Skipping to line 12.

(Whereupon counsel resumed to the reading of the deposition of Sidney Coleman as follows:) [504]

"Q. When you said you asked Mr. Colarusso, just what did you ask him?

A. I said, "Gus, will these two powders mix?" And he said, "Yes."

Q. Which two powders?

A. The cigarette case that I had in my hand, which I showed him and the polystyrene. In fact I tried to mix before that, without even consulting with him, polystyrene and polyethylene, and I had a very serious chemical reaction.

Q. When you asked Mr. Colarusso, can I mix polystyrene powder that this cigarette case is made out of, what he tell you?

A. He told me I'll check it and I'll let you know. He came back and told me, "Go ahead, you can mix it."

Q. How long did it take him to check it?

A. It didn't take him long at all. A couple of days.

Q. Do you know whether he made any experiments, Mr. Coleman?

(Deposition of Sidney Coleman.)

A. I think he checked with somebody from a factory. I don't know from where he got his information. After all he is a chemist and I have to buy what he tells me.

Q. Even when Mr. Colarusso told you this you did not know the composition of the different powders, is that right? A. No. I didn't. [505]

Q. Did you show the cigarette case which you received from the Dewey & Almy Company as a sample to Mr. Colarusso? A. Yes.

Q. When you showed it to him, Mr. Coleman, what did you say to him?

A. I said to him, "Gus, this has got the quality that I think I can use in the hold-down. Can I put this with polystyrene and will it work?" And he said, "I'll have to check, and I'll let you know."

* * * * *

(Whereupon counsel commenced reading the deposition of Erich Fritsch as follows:)

ERICH FRITSCH

"Direct Examination by Halle:

"Q. Mr. Fritsch, are you employed by Van Brode Milling Co., Inc.? A. I am.

Q. And they are the plaintiff in this action?

A. That is correct.

Q. What is your capacity with that company?

A. I'm the executive vice president and general manager of Van Brode Milling Co.

Q. Are you also a director?

A. I believe I am.

(Deposition of Erich Fritsch.)

Q. And are you a stockholder?

A. I am not.

Q. Are you generally familiar with the facts [507] concerning this lawsuit? A. I am."

Mr. Halle: Then I asked that the suit patent be marked as Exhibit A on the deposition.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. I hand you Defendant's Exhibit A, which is a copy of U. S. Patent number 2710660 and ask you if you know the inventor named therein, Sidney Coleman? A. I do."

Mr. Halle: Turn to page 16, please. Reading at line 3.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. Now, did you, at any time, ever become acquainted with the material that Mr. Coleman used—did Mr. Coleman ever show you a model of an item manufactured in accordance with Defendant's Exhibit A?

A. I believe he showed me a wooden model.

Q. And was that made out of several parts nailed together? A. Nailed or laminated.

Q. Was that at the first conversation that [508] you had with him concerning the item?

A. No.

Q. Later on? A. Yes.

Q. Was it after the application for the patent was filed? A. Before.

(Deposition of Erich Fritsch.)

Q. At that time, did Mr. Coleman tell you what material he planned to make the item out of?

A. He told me he was going to make it out of plastic.

Q. Did he mention the name of any company that he would purchase the plastic from?

A. No he did not.

Q. Did Mr. Coleman ever make a production model of the item? A. He himself?

Q. Yes. A. He did not.

Q. Did your company? A. We did.

Q. When did you make your first production model?

Mr. Kirschstein: I direct the witness not to answer.

Q. Did your company make the first production model? A. We did. [509]

Q. And was it at the direction of Mr. Sidney Coleman?

A. Mr. Coleman had no power to direct us to make that production model. We decided we'd want to make a production model.

Q. And was it made by employees of your company?

A. The production model was not made by employees of Van Brode Milling Co.

Q. Who was it made by?

A. Kaskadusa Tool Co."

Mr. Halle: Page 19, line 3.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

(Deposition of Erich Fritsch.)

“Q. Did Mr. Coleman supervise the manufacture of the first unit in your organization

A. What do you mean by supervised? Mr. Coleman has no knowledge of how to run a molding machine so therefore he's not qualified to supervise.

Q. What did Mr. Coleman do, if anything at all, in connection with making the first unit at your plant on Cameron Street in Clinton, Massachusetts?

A. He came in with this item as we discussed. We had a mold made. The question of materials were recommended by Mr. Coleman who had been in touch with a number of plastic manufacturers who manufacture molding powder such as [510] Bakelite, Monsanto, Dow Chemical Company.

Q. And did he also consult with the Dewey and Almy Co.? A. I believe he did.

Q. And as a result of those consultations did he bring in a material for you to use?

A. He brought in a material that he recommended we use.”

Mr. Halle: Page 22, line 1.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. And some of the work was done in your laboratory?

A. Some was probably done in our laboratory. Our molding laboratory had to waste some time on our molding machines. It didn't mold properly, and so forth.”

Mr. Halle: Skip down to line 14.

(Deposition of Erich Fritsch.)

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. Did there come a time when Mr. Coleman told you to order material from a particular company?

A. He would not tell us—he would recommend. There’s a little difference. After all, he’s not employed by Van Brode Milling Co. He can only suggest.

Q. Weren’t these services performed for you as a part of your general arrangement with Mr. Coleman? [511]

A. Actually, Mr. Coleman was not receiving a cent while this was being done.

Q. Why don’t you answer my question? Do you know whether Mr. Coleman was performing these services as a gift or as part of his arrangement with you? A. Part of our arrangement.

Q. Whether he directed or suggested you to do something, did there come a time when he named a certain company to purchase powder from to make the unit of the plastic battery hold-down frame?

A. Yes.

Q. What was the name of that company?

A. I believe it was Dewey and Almy.

Q. Did he show you anything in support of his recommendation to purchase the powder from Dewey and Almy?

A. He showed me a finished hold-down that was made.

Q. That was after you had made the mold?

(Deposition of Erich Fritsch.)

A. After we had made the mold.

Q. In other words, the mold was made first and at the time the mold was made, the choice of material was still in doubt?

A. I have no way of knowing. We ordered the mold and then we saw the plastic material that was used by Dewey and Almy and whether he had a plastic material before, I don't know. [512]

Q. I'm asking you if you knew of a plastic material at the time the mold was made?

A. I did not.

Q. The various materials tested were tested in the mold made at Kaskadusa Tool Co.?

A. That's correct.

Q. And at that time, you had only one mold, is that correct? A. One mold.

Q. Do you know how long it took from the time that you received the mold from Kaskadusa Tool Co. until you had decided on the material of the Dewey and Almy Co.?

A. I think as soon as the mold arrived, the material was on hand to be tested.

Q. Well, you also had other materials at that time, to test? A. Probably.

Q. Now, how long was it until you made the decision, after the testing period, to use the Dewey and Almy material?

A. I can't recall the exact time.

Q. Was it a matter of some weeks?

A. Maybe a couple of weeks. That they were

(Deposition of Erich Fritsch.)

going to be the source of supply or that we were going to purchase some material from them?

Q. That's right.

A. I have to say I imagine—I don't know—it was [513] within a couple of weeks, because we were very anxious to see what this item was going to be."

* * * * *

"Q. I'm directing your attention to the time when the mold was delivered to your company from the Kaskadusa Tool Co., and I understand that at that time you had powders from several different companies to test on that mold in making the battery hold-down frames. I also understand that within a period of a few weeks your company made a decision to use the Dewey and Almy product in making that unit? A. Yes.

Q. At that time, did you find that any other powder made by other companies or company was satisfactory for your purpose?

A. All I can tell you is that after a period of time, Dewey and Almy was found to be unsatisfactory, very shortly thereafter.

Q. And you then substituted Dewey and Almy powder with [514] a different powder?

A. I don't know whether they used Dewey and Almy's with somebody else's. I don't know.

Q. But at any rate the battery hold-down frame made with the Dewey and Almy powder alone was not satisfactory?

A. It did not give us what we were looking for in a good well-rounded item."

(Deposition of Erich Fritsch.)

Mr. Halle: Turn to page 28, please, line 16.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. And did you find that in the original battery frames there was a weakness in construction?

A. In the original frame, there was a weakness in construction.” [515]

* * * * *

“Q. Did Coleman ever give your company a written formula for a plastic for the material for a plastic battery hold-down frame?

A. I don’t know of any written formula.” [517]

* * * * *

“Q. I believe you testified on October 11, 1957, that the present practice of your company is to mix one of these powders, some Bakelite powder or Monsanto powder, with some other materials in molding. Mr. Coleman testified that you used the powder as you receive it from the supplier, without any change other than to mold it into a battery frame. Now, do you know which is the correct answer? A. Yes.

Q. Which?

A. We mix both. We use two materials and they are mixed. Mr. Coleman was in error. In fact, last night was the last time I had seen him. I asked him “How come you said that?”; and he said “I never said that.” He was in error then. He didn’t think he was making such a statement.

(Deposition of Erich Fritsch.)

Q. He may not have thought so, but that is what he said; that is what my recollection is.

A. Well, that is what the testimony reads.

Q. But, at any rate, whether he said it or didn't say it, the correct thing would be to say that it is mixed with some other material?

A. Our present hold-down is made of at least two materials.

Q. Would that be a mixture of Monsanto and Bakelite?

A. Do I have to answer that? These are trade secrets of current nature, I feel.

Q. You claim a privilege of a trade secret?

A. On technique, sure." [519]

* * * * *

Mr. Kirschstein: Going back to page 27, line 1.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. And the sale of the first unit, was that a unit made with the Dewey and Almy powder?

A. I believe it was.

Q. Was it after that date that you found that the Dewey and Almy powder was not entirely satisfactory?

A. Now, whether at that time, we also had another material, I can't answer because there's no question that we had some Dewey and Almy material in the beginning.

Q. What I'm trying to do is refresh your recollection.

A. We did sell some items with Dewey and Almy

(Deposition of Erich Fritsch.)

powder. These items might have been made prior. I know nothing was [532] sold because no invoice was made—I talk about a sale, I mean actually shipped out—until the beginning of 1952.

Q. Now, taking the first sale as a point of reference, does it refresh your recollection as to the date when your company discovered that the Dewey and Almy powder alone was not entirely satisfactory?

A. The date? I didn't look at the date. It wouldn't mean anything to me particularly.

Q. The one thing doesn't relate itself in your mind to the other? A. No.

Q. Well, would you say that the item was proved unsatisfactory after you'd had some sales experience with it?

A. I think it was a question of testing and continually testing—put them on a car in cold weather. I know I had them on my car.

Q. And was that during the winter of 1951-52?

A. I would say so.

Q. Can you recall which month you had it on your car? A. I don't recall the months.

Q. It was during freezing weather?

A. It was during cold weather.

Q. Did you find that the battery frames contracted in cold weather? A. No. [533]

Q. What did you find was unsatisfactory with them?

A. It was an acceptable item, however it could

(Deposition of Erich Fritsch.)

stand improvement. We changed the structure, made certain parts stronger.”

Mr. Kirschstein: Page 33, line 18.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. Did you receive returns of battery hold-down frames during the period, 1952?

A. I don’t think so.

Q. No frames were returned?

A. I don’t know of any.

Q. You don’t know of any frame being returned because it was unsatisfactory?

A. I, myself, don’t know of that.

Q. Who would know that?

A. I think we’d have to check if there’s any returns in the accounts receivable or Mr. Coleman would know. Let me modify that in one way. If an account went out of business and merchandise was returned, certainly, there must have been a refusal, but I, myself, don’t know of any specific return.

Q. Mr. Coleman would be the man to know if there were any returns because the material was unsatisfactory?

A. I imagine so. I don’t recall of any complaint from [534] the outside of our material being unsatisfactory.”

Mr. Kirschstein: Page 40, line 19.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

(Deposition of Erich Fritsch.)

“Q. Did Mr. Coleman ever give you a sketch of a plastic battery hold-down frame?

A. To me, personally?

Q. To your company? A. Probably.”

Mr. Kirschstein: Page 66.

There are some exhibits here that I think we want. Did you mark Exhibit L?

Mr. Halle: No.

The Court: You can mark them now.

Mr. Kirschstein: This is Defendant's Exhibit L in this deposition, which I am having marked now as a plaintiff's exhibit.

The Clerk: Plaintiff's Exhibit 86.

The Court: All right.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 86 for identification.)

The Court: What is this, roughly?

Mr. Kirschstein: Invoices from the Dewey and Almy [535] Company.

The Court: I presume that is to establish the date which Mr. Coleman didn't know?

Mr. Kirschstein: It is to establish, your Honor, the quantity of powder that was bought from Dewey and Almy and actually used in frames.

The Clerk: Plaintiff's Exhibit 86 is marked for identification.

The Court: All right.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

“Q. I hand you Defendants' Exhibit L for identification, Mr. Fritsch. These are papers which your

(Deposition of Erich Fritsch.)

counsel has furnished to us in reply to a request made for records concerning the Dewey and Almy Chemical Company. Did you furnish these papers to your counsel? A. I have.

Q. Who made the search for these papers?

A. I directed Mr. Crossley, and a girl in correspondence, a stenographer, to look in the general file for them.

Q. When was that search made?

A. Prior to my last testimony.

Q. That is, prior to October 11, 1957?

A. In other words, when we were requested to bring whatever files we had available. [536]

Q. Now, in this exhibit there are some letters from Dewey and Almy Chemical Company to Mr. Colarusso of your organization. There are other letters between your organization and Dewey and Almy Chemical Company. There are invoices for the purchase of Darex copolymer No. 3. Do the invoices contained in this exhibit represent the total purchase of Darex copolymer No. 3 for battery hold-down frames by your company?

A. These are all we have been able to find, yes, sir."

Mr. Kirschstein: Page 69, line 9.

I need the other exhibits for this.

Mr. Halle: Do you just want to establish a date of purchase?

I will stipulate that and we can save some time that way.

Mr. Kirschstein: Your Honor, we are stipulating

(Deposition of Erich Fritsch.)

that the first order by the plaintiff from the Bakelite Company was June 18, 1952.

Mr. Halle: It is so stipulated.

The Court: All right.

Mr. Kirschstein: And the first order from the Monsanto Company was on August 12, '52.

Mr. Halle: So stipulated.

The Court: All right.

This Exhibit 86, the invoices, would indicate [537] November 2, 1951. 40 bags, I think. I don't know what that means. "14—40 bags Darex Copolymer No. 3 (36 bags—back ordered)"—what does that mean?

Mr. Kirschstein: I don't really know, your Honor. I put the exhibit in to demonstrate the quantity of powder that was purchased from the Dewey & Almy Company.

The Court: All right.

Mr. Kirschstein: Mr. Miller tells me that what that means is they made an incomplete delivery the first time and they were completing it.

The Court: There are several invoices, however. That is one of them, November 2nd. The price \$257.60.

And then there is one dated October 22nd, evidently they go backwards, giving 10 bags, price \$184.00.

And then there are letters, and then there is another one, November 8, 1951, 40 bags, and 29 bags, \$533.60.

Then a receipt follows, and then another order,

(Deposition of Erich Fritsch.)

November 8, '51, seven 40-pound bags, \$128.89, and then a receipt for those. And then another receipt, and the rest is correspondence relating to them.

Mr. Kirschstein: I would like to explain that the reason for this is that Mr. Coleman was mistaken as to how soon the Darex was stopped being used——

Mr. Halle: Are you putting that in to impeach your own witness? [538]

Mr. Kirschstein: No. I am making a statement.

The witness at the time didn't testify from records, and it turned out the material had been used a year longer.

The Court: That is all right.

Mr. Kirschstein: In reading the depositions the way they were read, an erroneous impression was created, and that is why I am taking the time to show your Honor how much was used.

The Court: It was quite apparent that he was testifying from memory and didn't have it, and if these had been presented to him later on, he would have identified them.

That is not impeaching one's own witness; it is merely supplying a deficiency in a witness' testimony due to the fact that he didn't have the records before him.

Mr. Kirschstein: That is exactly it, your Honor.

The Court: All right.

Mr. Kirschstein: Page 77, starting with the answer on line 5:

"We use Bakelite material"——

(Deposition of Erich Fritsch.)

The Court: You gentlemen have been using these depositions back and forth, and there is no record made that either of you were resorting to 43(b), so the ordinary rules don't apply. We presume that all witnesses speak verity, and you introduce them for whatever purpose they are material. That is of course the danger of a deposition. [539]

When you have live witnesses, you can protect yourself against a statement by an opponent by calling him under 43(b), and you can contradict him.

I merely wanted to see what the object of this group of letters was.

Mr. Kirschstein: That exhibit shows how much was actually used.

The Court: Evidently a large quantity, beginning in October.

Mr. Halle: But, of course, a lot of it was wasted, because they couldn't mix it, your Honor.

Mr. Kirschstein: I object to that statement.

The Court: I pay no attention to statements of counsel that are comments on the evidence.

I think you have done pretty well, so let's keep that up.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"A. We use Bakelite material and we use Monsanto's material, the two purchase orders herein covered, covering the first purchases from each company.

(Deposition of Erich Fritsch.)

Q. How long have you been using those materials in that fashion?

A. Since about 1952.

Q. That was when you stopped using the Dewey and Almy material? [5540]

A. That is true.

Mr. Kirschstein: I think it should be clear that he means that is when he stopped using the Dewey and Almy material as a modifier for polystyrene. Isn't that what you mean?

The Witness: Not knowing too much about the chemical properties, about the Dewey and Almy or this, I know the Dewey and Almy—the first purchase we ever made of Monsanto was in 1952, so sometime before this date, which was—I don't know—we had to finish using the materials that we had on hand previously."

The Court: That is evidently from Coleman's, too, because he spoke of the returns and breakages, showing that this material had been sent out and had come back unsatisfactory. And this now confirms it.

They being thrifty New Englanders, they wanted to use the material before they started something else. [541]

* * * * *

Mr. Kirschstein: Page 84, line 11.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. Since we have had a chance to talk on October 11, and since you have spoken to Mr. Coleman at various times since then, have you made any ef-

(Deposition of Erich Fritsch.)

fort to determine when you definitely stopped using the Dewey and Almy powder in commercial production?

A. When we were searching for the first purchase order—there is no record of production records that would indicate when one material is stopped and when one material is started, so therefore you have to narrow it down to when did you purchase the next material, and then you have to base your assumption that when you received the new material the old material must have been used up, because we didn't throw it away.

Q. So that if your first purchase of Monsanto material was 8/6/52—that would be August 6, 1952—and your first purchase of Bakelite was on 7/8/52—I guess that is July 8, 1952—it would be fairly certain that you didn't use either one of those materials prior to the dates or purchase? [542]

A. That is correct.

Q. And that all of the frames shipped out before then would have been made with the Dewey and Almy copolymer plus the polystyrene.

A. Sure.

Q. I refer to Exhibit 31."

Mr. Kirschstein: That was the sales analysis.

(Whereupon counsel resumed the reading of the deposition of Erich Fritsch as follows:)

"Q. I refer to Exhibit 31. The first entry would be June, 1951 to, I believe—what was the end of your fiscal year then?

A. I think we were going in May. Actually, look-

(Deposition of Erich Fritsch.)

ing in the ledger, though, of course, it shows May 31 or June 1, where this entry is \$16,339.35, right here (indicating); and that is June 1.

Q. And that would represent shipments on or before June 1, 1952? A. Right.

Q. Would those figures of shipments show what returns were made on those \$16,000 worth of frames?

A. Not in this particular page.

Q. Would you have it on another page?

A. I see 1951 and 1952 returns, plastic, forks, knives, hold-downs, \$470.06.

Q. That does not indicate why those returns were made, does it? A. No.

Q. That figure is not significant as to why the frames were returned? A. No.

Q. Would it be safe to say that sometime after June 1, 1952, and within a month or two thereafter was the time when you stopped shipping frames made of the Dewey and Almy material?

A. After June 1, 1952?

Q. Yes.

A. That would be rather hard to say, because—since when we brought in Bakelite's material in July—So there is a possibility that we had a quantity of hold-downs made on hand in July of 1952 of Dewey and Almy. There is no way of determining that.

Q. Do you know how many pounds of material it takes to make a frame?

A. I have an idea, yes. You can weigh it up.

(Deposition of Erich Fritsch.)

Q. About how much?

A. We weighed it.

Q. In other words, the weight of the frame weighs approximately the same as the weight of the material that goes into it? [544]

A. Exactly. You might lose one tenth of one per cent in waste, or something that is thrown away.

Q. The figure of about \$16,000 would be approximately 32,000 frames?

A. I can't use that figure back in 1951, because the price at that time was a lower price, you see, so when Mr. Kirschstein asked me what is the average price today, I said, 'About sixty cents or fifty cents.' So it varies, you see." [545]

* * * * *

ISADOR MILLER

recalled as a witness herein, having been heretofore duly sworn, was examined and testified further as follows, in rebuttal:

Direct Examination

Q. (By Mr. Kirschstein): Mr. Miller, if in early '51 or 1950 you had wanted [551] to make a battery hold-down frame of plastic, was there available on the market an appropriate plastic for you to select?

A. No complete molding powder with the necessary properties was available in 1951.

Q. If you had wanted to make such an object out of polystyrene, and recognized the deficiencies

(Testimony of Isador Miller.)

of polystyrene, what would have been your attack on the problem?

A. Well, knowing that we required a material which had a certain rigidity or building strength, as well as elasticity, I would have endeavored to modify the properties of the polystyrene by the introduction of a plasticizer, and in that way hope to arrive at a material which would have the proper resiliency and flexing strength for the purpose.

Q. Is this what the inventor did?

A. No, sir.

Q. When did the term "high impact styrene" first come to your attention?

A. The term "high impact styrene" came to my attention either the end of 1951 or early in 1952, as a material available on the market.

Q. Do you recall how it first came to your attention by any chance?

A. One of my clients attended a meeting of the Society of Plastics Industry which, if I remember correctly, took place in December of 1951, and reported to me on the subject [552] matters which had been discussed and which had come to his attention at that meeting. That meeting I believe was held in Detroit. He mentioned to me that either through a slip in the course of one of the meetings, or at one of the so-called receptions in the suite of the Bakelite Company, one of their men had let slip a statement that before very long the Bakelite Company was going to put upon the market a high

(Testimony of Isador Miller.)

impact polystyrene superior to anything which had been on the market previously.

Q. Did Bakelite have high impact styrene in 1948? A. They did not.

Q. Can you substantiate that?

A. I believe I can. I have a book called *The Handbook of Plastics*, edited by three men, Simmons, Weth and Bigelow. The Weth in this case is a former research director of the Bakelite Company in the Banbrook plant, which is the plant which manufactures their polystyrene molding powders. The preface to the book is dated 1948. The section in the book on polystyrene is written by a member of the research department of the Bakelite Company.

In this book there is a section which is on page 107 headed Bakelite Corporation Unit of Union Carbide and Carbon Corporation, Bakelite Brand Plastics.

At the bottom of the page starts the section on polystyrene molding plastics, and that section does [553] not mention a high impact styrene.

Incidentally, I may say that this section of this book, as is well known to everybody who knows the book—I am personally acquainted with two of the editors—this section of the book is practically nothing but a reprint of the catalogs, the catalog sheets of the various manufacturers, and, as I say, in this particular section which is substantially a reprint of Bakelite data as given out to the trade, there is no mention of high impact styrene.

(Testimony of Isador Miller.)

In the section on page 421, which is the section designated Polystyrene, next to the title there is a number referring to a footnote, and this footnote says "Prepared in cooperation with Virgil Mayhard, Bakelite Corporation." Mr. Mayhard is not personally known to me.

In this section, also, where they give the various forms, where he discusses polystyrene, its uses and properties, there is no mention of any material which he designates as high impact polystyrene.

From that I conclude that at the time of the publication of this book, in other words, in October of 1948, a commercial high impact polystyrene was unknown to the Bakelite Company.

Q. When does the term "high impact polystyrene" first appear in *Modern Plastics*?

A. 1952. [554]

Q. Have you anything to substantiate that?

A. I have.

Q. These Exhibits 82, 83, 84, and 85, I hand you.

A. These exhibits, your Honor, are photostats of the title page, the index page or pages, and the page referring to the properties of polystyrene as described in these issues.

In the 1949 issue under the title "Styrene," it starts on page 20, "Styrene Resins"——

Q. (By Mr. Kirschstein): What exhibit is that, Mr. Miller?

A. This is Exhibit No. 82. This is the 1949 copy. The index page starts on page 20. In the third col-

(Testimony of Isador Miller.)

umn on the right-hand side there is the title "Styrene Resins."

The index continues to the next page, page 21, and I will read the last two entries on page 20 under "Styrene," "Finishing," "Foamed," "High Styrene Copolymers," "Identification Chart." The term "high impact" does not occur on that page.

In the 1950 issue, corresponding——

Q. What exhibit is that?

A. No. 83. In the corresponding sections we have "Styrene Resins," reading in the same way, "Finishing," "Foamed," "Heat Sealing," "Identification."

The term "high impact" as a classification [555] of styrenes which are to be discussed does not appear.

In Exhibit No. 84, which is the 1951 corresponding sheets, the index sheets on page No. 12, the section "Styrene" — under "Styrene" we have "Foamed," "Glass Mat," "Heat Resistant," "Housings, Machine," "Lacquers For," "Latex." The term "high impact polystyrene" as a section to be discussed does not occur.

In Exhibit No. 85, which is the 1952 section, the index page No. 15 under "Styrene" has the terms "Foamed," "Foamed, Fabricating," "High Impact, Molding, page 74." This is the first issue in which the term "high impact polystyrene" appears in Modern Plastics. [556]

* * * * *

Q. (By Mr. Kirschstein): Mr. Miller, you have

(Testimony of Isador Miller.)

been handed a copy of Defendant's Exhibit A, the Goodrich patent; are you familiar with that?

A. I am.

Q. Was the modified polystyrene described therein known to you in 1951?

A. It was not.

Q. Was information as to its composition available to you in early '51? [559]

A. It was not.

Q. Why is that?

A. This patent issued on the 11th day of December 1951, and the subject matter therein described was in the Patent Office and in the Patent Office files, the patent was under prosecution, and that information was not available to me.

Q. Have you examined the claims of this patent?

A. I have.

Q. Do they relate to an article?

A. They relate to an article, to a molded battery container.

Q. Molded battery container?

A. All the claims read on a molded battery container. There are seven claims in the patent.

Q. Does the patent indicate any other use for the materials?

A. In the body of the specification the patent states that these materials described in this patent are suitable for use as stiffening agents for shoe soles and heels.

Q. Are you familiar with the Goodrich Company? A. I am.

Q. What is their primary business? [560]

(Testimony of Isador Miller.)

A. The Goodrich Company is a rubber and rubber goods manufacturer, which among other things manufactures batteries.

Q. Do they make finished articles?

A. They make finished articles in the rubber field.

Q. Did you hear the testimony of Mr. Stringfield regarding a comparison of the teachings of the Goodrich patent and the suit patent?

A. I did.

Q. Do you agree with his testimony?

A. I do not.

Q. In what respect don't you agree?

A. The Goodrich patent relates to a molded battery container and relates to a molding compound. The suit patent relates to a hold-down frame made from a specific material.

Q. Outside of the difference in the articles, is there a difference in the teachings of these patents beyond that?

A. In the words—as I say, referring to the molding art in one case——

Q. In which case?

A. In the Goodrich case, and in the other to a specific use for a specific purpose, it relates to a modification of polystyrene so as to make it suitable for a specific use, namely, a hold-down frame. [561]

Q. What is the Goodrich patent concerned with, primarily?

A. It is concerned primarily with a battery container of a given composition.

(Testimony of Isador Miller.)

Q. And what, with respect to that container?

A. The molding properties of that container—it is a hollow, five-sided object, and the molding properties which must be inherent in a material which is suitable for the manufacture of such a hollow, five-sided object.

Q. Do you know the material of which battery casings have ordinarily been made?

A. Ordinarily have been made of hard rubber, so-called hard rubber.

Q. Is there any suggestion in the Goodrich patent to making a plastic battery hold-down frame with the material? A. There is not.

Q. Referring to the 1950 Modern Plastics Reference, Defendant's Exhibit T, are you familiar with that reference? A. I am.

Q. Does it anywhere suggest making a battery hold-down frame from any of the materials shown in it? A. It does not.

Q. Does any reference submitted by the defendant show this, or suggest this? [562]

A. None of the references I have seen. Mr. Kirschstein, I would modify that to say that yesterday afternoon the defendant introduced four structural patents, of which I believe at least two referred to a battery hold-down frame.

Q. I am talking about the references having to do with plastics and plastic materials, do they suggest anywhere using any of the same for battery hold-down frames?

A. None of the references indicate that use.

* * * * *

(Testimony of Isador Miller.)

Q. (By Mr. Kirschstein): Did you hear Mr. Stringfield's definition of a Buna S with a high styrene content? A. I did.

Q. Do you agree with that definition?

A. I do not.

Q. Could you explain to us why?

The Court: I will sustain an objection because he has already told us that in his opinion everything from 25 up is high, and it is just merely repeating what he already told me before.

Mr. Kirschstein: I just want him to explain why. Mr. Stringfield had an opportunity to criticize Mr. Miller's definition. I simply want Mr. Miller to explain why he feels it should be defined his way, that is all.

The Court: He has told us that in his opinion anything 25 per cent or over is high. And the other man said in his opinion—he didn't criticize the other man's opinion, but he merely said in his opinion—and your inventor agrees with him, your inventor says that high means 50 per cent or above. That is what his testimony is in this case. [568]

Mr. Kirschstein: He didn't know, your Honor—

The Court: That doesn't make any difference. That is why I said we have three views; the inventor who says the defendant's expert is right, and your expert says the inventor is wrong; he didn't know anything about it. But you are not defending Mr. Miller. Mr. Miller didn't invent this process.

* * * * *

(Testimony of Isador Miller.)

Q. (By Mr. Kirschstein): Mr. Miller, if somebody showed you the suit patent and asked you to make a battery hold-down frame on the basis of that disclosure, would you be able to do it?

A. I would be able to use the proper material for making it.

Q. Would you have any trouble finding a method of mixing? [569]

A. I would not.

Q. Why is that?

A. In the rubber and plastic art there are standard pieces of equipment which are used for practically all mixing operations.

In the plastic art these pieces of equipment were adapted from the rubber art. They consist essentially of two classes. One is what can be described as mixing rolls, and the other is internal mixers best illustrated by the Banbury type mixer.

Those are the tools which are available to us in the rubber and plastic art for the mixing of materials, and I would know in order to mix the materials described in this patent I would require the use of those tools, and I would know how to use them, and I therefore would not anticipate any difficulty in arriving at a proper mix.

Q. Would you have any difficulty with the molding temperatures or pressures?

A. I don't think so. I know I would not have any difficulty because each plastic has its own range of temperatures at which it gives optimum results. And as far as the pressures required for a given plastic, those pressures are also a function of the

(Testimony of Isador Miller.)

machinery available for molding that material, and in injection molding material those pressures would be within a given range, and I would not have any [570] difficulty in choosing the range which was suitable both for the material and for the equipment.

Q. Would you have any trouble in getting your formulation? A. I would not.

Q. Have you ever worked under a patent before? A. I have many times.

Q. Were you ever able to immediately get the exact formulation for the best result?

A. I don't believe I have ever been able to get the optimum results in the first try. But in any patent where the disclosure is given, for anybody who works in the particular art and is familiar with the particular art, there is no difficulty in arriving at a practical result even though it may not be the optimum.

Q. Does the suit patent differ from this, in your opinion?

A. Not in my opinion. [571]

* * * * *

The Court: But you heard the testimony read of an officer of plaintiff's company, that for eight or nine [574] months, from August, if I remember, of 1951, to '52, they experimented with this Dewey & Almy product, but they proved breakable and unsatisfactory, and until they turned to Bakelite and had a more homogeneous mixture——

The Witness: The result was undesirable.

The Court: ——the result was undesirable.

(Testimony of Isador Miller.)

It is only when they struck upon the Monsanto material——

The Witness: Let me be so bold as to speak out of turn, because I am now in a position where I am not answering a direct question, but since you have brought up the question of testimony, may I call to your attention that just before the noon recess from one of the depositions that was read it was shown that out of \$16,000 worth of materials which had been shipped, only \$470 odd worth of returns had been returned, and——

Mr. Halle: Your Honor, may I——

The Witness: As I say, I am a little out of my province.

Mr. Halle: May I move that this answer be stricken?

The Court: Yes, it may be stricken.

What I meant to say is this: Don't you think that a patent, from the standpoint of a chemist—I will decide the legal question.

The Witness: I believe you will, your Honor.

The Court: But from the standpoint of a chemist, don't you think that a disclosure which would require you to experiment for months with the ingredients, and look for substitution, lacks something from a scientific standpoint of having that accuracy which should attach to an invention, aside from any legal question?

The Witness: But, your Honor, I do not agree with you that this invention is so described as to require months of experimentation in order to ar-

(Testimony of Isador Miller.)

rive at a proper formulation, nor do I agree, if I may be so bold as to say so, with your Honor's statement that this invention also requires experimentation to arrive at a proper substitute.

The Court: I am going by what the evidence showed, that they finally had to abandon that Dewey product and substitute for it after eight months.

* * * * *

The Court: He started out by claiming the entire field.

I want to go back to that claim 1 that was rejected, because to me the whole lawsuit hinges upon that, and that is upon the two original claims which were rejected. All he asked for was a one-piece battery hold-down frame formed of plastic material comprising sides, ends connecting said sides, and diagonal clamping members at the juncture of said sides and ends, said clamping members being disposed above the top faces of said ends and sides, the plastic material of which said frame is formed having good electrical insulating properties, resisting changes in physical properties at different temperatures and possessing strength and toughness sufficient to withstand pressure to which the frame is [602] subjected in its function to hold the battery on its support by having enough flexibility to prevent breakage of the battery top against which said diagonal clamping members bear in the holding down operation.

The second one was a one-piece battery hold-down frame according to claim 1, including lugs for en-

gagement with means which force said clamping members into engagement with the battery top.

In other words, he was claiming the whole field of plastic batteries.

He said, "I am the first one who thought of using it in that connection. I want it all."

That was rejected.

The Appeals Board heard it, and they upheld the rejection.

When he came back he tried to recapture this, plus the four new ones. The Examiner modified many and struck out these two, so all he has got is the four claims which are merely a certain type of plastic hold-down frame.

Now, if, as you say, any person by picking this up could manufacture it without the quantities being given as to ingredients, if that is sufficient, then it is too broad. All you have to do for anybody, whoever does that, is to put your own interpretation upon the word "high."

Now, if that is what you claim, you are claiming [603] the entire field, then the Patent Office was wrong in not allowing you a monopoly on everything that is made.

Is the quantity necessary?

It is admitted that it is necessary, because even Mr. Miller says with all his scientific knowledge that he would try, knowing chemistry, he would try to combine various things until he arrived at the proper thing.

Now, is an inventor who is as hazy in his description that a word that he uses can be inter-

preted by himself as meaning 50 per cent, by an expert employed by his own company who says he doesn't know what he is talking about, because it is anything above 25, and by a third man, who is a scientist and expert brought in by the defendant, who says that "high" would be over and above 50—is a man like that to be given the benefit of a full disclosure which he did not make?

On the other hand, if you limit him, if you say, "This is sufficiently described," then of course if you place patentability on the word "high," then it becomes a question in each case whether it is high or low, and therefore anything below 50 per cent, if we take the inventor's word for it, or the defendant's expert, isn't infringement.

In other words—I am not putting it correctly. It is the end of the week and I am usually tired after a long week. Perhaps it will read better than it sounds. [604]

The point is this: We are in this dilemma of allowing a hazy description, and if we say this description is sufficient, then we give him a monopoly to which he is not entitled. And by contrast if we say this is subject to proof as to what is high, in view of the fact that there is no standard, and three persons, including the inventor, do not agree as to what is high, then we have one of two dilemmas: Either the man who uses a lower percentage in the mixing of material is not infringing, or the disclosure is inadequate.

If it is inadequate, then there is no invention, because the combination of the two themselves is

not what he taught to the art of chemistry. The art of plastics taught what these two elements will do when combined. [605]

* * * * *

Mr. Kirschstein: He suggested making the frame of plastic, and provided a plastic to make it out of, and that made a substantial contribution to this industry.

The Court: Then you are back to your original. Anyone who makes a plastic out of the two in what [611] you consider a high combination—he doesn't say how much. What is a high combination, then?

If that is true, then there is not enough disclosure. There cannot be enough disclosure if the inventor himself can disagree with the theory on which his assignees try the lawsuit. [612]

* * * * *

[Endorsed]: Filed August 18, 1958.

[Endorsed]: No. 16168. United States Court of Appeals for the Ninth Circuit. Van Brode Milling Co., Inc., Appellant, vs. Cox Air Gauge System, Incorporated, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: August 25, 1958.

Docketed: September 3, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16168

VAN BRODE MILLING CO., INC.,

Appellant,

vs.

COX AIR GAUGE SYSTEM, INC.,

Appellee.

CONCISE STATEMENT OF POINTS UPON
WHICH APPELLANT INTENDS TO RELY
UPON APPEAL

Comes Now the appellant in the above entitled action and, pursuant to the provisions of Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, files a concise statement of the points upon which appellant intends to rely:

1. The court erred in finding that (Finding of Fact 13):

“There is nothing in the record to indicate that the color red on the frame or the colors red and white on the boxes, have become associated in the minds of either prospective customers or suppliers with the plaintiff’s product or that either have acquired a secondary meaning which identifies their source and sponsorship with the plaintiff.”

2. The court erred in failing to find that plaintiff had established a secondary meaning in the

color red as identifying plastic battery hold-down frames of said color as originating from plaintiff.

3. The court erred in finding that (Finding of Fact 9):

“There is no evidence of limitation or deception which would tend to mislead the public as to the source and sponsorship of the goods.”

4. The court erred in failing to find the color red and the particular shape of plaintiff’s plastic battery hold-down frame had acquired a secondary meaning.

5. The court erred in finding that (Finding of Fact 11):

“There is no evidence of actual confusion or tendency to confuse.”

6. The court erred in not finding that the claim of unfair competition based upon secondary meaning should be sustained on the basis of proof by plaintiff, established by the record, that the color and shape of plaintiff’s battery hold-down frames were not functional, had both acquired secondary meaning and had both been imitated by the defendant.

7. The court erred in not sustaining plaintiff’s claim for unfair competition.

8. The court erred in stating that (Opinion, page 2):

“Nor can he (plaintiff) appropriate the color red for the making of a plastic hold-down frame and,—in the absence of any imitative deceptive devices which tend to mislead the public as to source and sponsorship of the goods,—claim un-

fair competition on the part of another device similarly made of plastic and colored red.”

9. The Court erred in stating that the file wrapper of the patent in suit showed that the inventor still sought to obtain the original two claims of the patent application after the appeal to the Board of Appeals in the Patent Office and pressed these two claims as well as four additional and new claims with the Examiner after the decision of the Board of Appeals (Opinion, pages 4 and 5).

10. The court erred in stating (Opinion, page 6):

“There is nothing in the patent to indicate to anyone skilled in the art what the words ‘high styrene content’ mean.”

11. The court erred in stating that the evidence showed that for the first year after the application for the patent was made, and during which time a considerable number of frames were sold, that the chemical combination employed by the plaintiff did not work successfully (Opinion, page 14; Finding of Fact 47).

12. The court erred in stating that the combination of substances, namely, polystyrene modified by a butadiene styrene copolymer, as called for by the claims, was known and taught in the art for a long time prior to the date of conception of the invention of the patent in suit. (Opinion, pages 14, 15 and 16).

13. The court erred in stating that the patent in suit does not teach how to combine polystyrene with a butadiene battery hold-down frame (Opinion, page 19).

14. The court erred in finding that the Ditz et al patent No. 2,578,518, granted December 11, 1951, taught how to modify polystyrene with a butadiene styrene copolymer of high styrene content to provide a material for a practical plastic battery hold-down frame. (Finding of Fact 30).

15. The court erred in admitting the Ditz et al patent as part of the prior art and in failing to hold that said patent was admissible only on the issue of prior inventorship, if such issue were presented.

16. The court erred in admitting the Ditz et al patent as admissible on the issue of prior inventorship since the invention of said patent was not the same as the invention of the patent in suit.

17. The court erred in stating that the modifying copolymer used in defendant's device had a low and not a high styrene content and that said device, therefore, does not infringe the claims of the patent in suit (Opinion, page 18).

18. The court erred in stating that invention does not lie in recommending either the use of plastic or of one plastic rather than another as a material for a practical battery hold-down frame (Opinion, page 18).

19. The court erred in stating that the use for

which the patent in suit recommends the composition therein described was not new or nonanalogous to prior art teachings (Opinion, page 18).

20. The court erred in finding that the plastic material disclosed in the patent in suit for use in manufacturing a practical battery hold-down frame had been taught in the art long prior to the invention of the patent in suit (Finding of Fact 33).

21. The court erred in finding that the term "high styrene content", as used in the specification claims of the patent, means more than fifty percent (50%) styrene (Finding of Fact 37).

22. The court erred in admitting the deposition testimony of the witness Daniel P. Phillips, particularly with respect to the first use and first date of use of Bakelite material over the objection that such testimony was entirely hearsay.

23. The court erred in stating that it was inevitable that those connected with the plastic and automotive industries would think of using plastics of high resistance for battery hold-down frames (Opinion, page 18).

24. The court erred in finding that (Finding of Fact 38):

"The specification of the suit patent does not contain a written description of the invention and of the manner and processes of making and using it in such full, clear, concise and exact terms as to enable any person skilled in the art to which it

pertains or with which it is most nearly connected to make and use the invention, and it does not set forth the best mode contemplated by the inventor of carrying out his invention.”

25. The court erred in finding that (Finding of Fact 39):

“The specification does not conclude with one or more claims which particularly point out and distinctly claim the subject matter which the applicant regards as his invention.”

26. The court erred in finding that (Finding of Fact 41):

“The term ‘high styrene content’ as used in the patent is vague and indefinite, and as used in the claims is broader than the applicant’s disclosure. Even construing it to mean more than 50% styrene content, it covers too broad a range and gives to the patent holder far more than he would be entitled to.”

27. The court erred in finding that (Finding of Fact 42):

“If invention lies in the use of a copolymer of high styrene content, Coleman did not teach that to the art. It was old in the art and the suit patent cannot claim what Coleman did not invent. The patent does not amount to invention over the prior art.”

28. The court erred in holding the patent in suit invalid (Conclusion of Law 7).

29. The court erred in finding that the battery frame described and claimed in the patent in suit lacks utility (Finding of Fact 51a; Conclusion of Law 7).

30. The court erred in failing to find the patent in suit, including the claims in issue, valid.

31. The court erred in failing to find that the battery hold-down frames of the defendant infringed the claims in issue.

32. The court erred in dismissing the complaint in its entirety (Conclusion of Law 12).

Dated: This 18th day of September, 1958.

LYON & LYON,
/s/ REGINALD E. CAUGHEY,
Attorneys for Appellant.

[Endorsed]: Filed September 19, 1958. Paul P. O'Brien, Clerk.